SUBMITTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 57

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PETITIONER,

vs.

WELLS-DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED APRIL 29, 1928

CERTIORARI GRANTED JUNE 1, 1928

(31,883)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 355

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1926

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State of Minnesota
In Supreme Court

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — 4th Judicial District

2

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased, Plaintiff,

vs.

CHICAGO, BURLINGTON and QUINCY RAILROAD COMPANY, Defendant

ORDER

3

Upon all records and proceedings in said action and upon order of the court of Douglas county, the 7th Judicial District

It is hereby Ordered, that the Clerk of the above named Court may place said cause on for trial by jury October 23, 1922, at 10 o'clock in the forenoon.

Dated September 22, 1922.

By the Court,

G. W. BUTTINGTON,

Judge.

4 (Title of Cause)

7th Judicial District

COMPLAINT

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation, duly organized, created and existing under and by virtue of the
5 laws of the state of Minnesota, as a Trust Company and by reason of the authority granted to it as such corporation it ever since has been and now is engaging in the business of establishing and maintaining a trust business in the City of Minneapolis, and elsewhere, that in connection with said business, it is authorized to act as trustee and personal representative for and on behalf of deceased persons, and their estates, that after the death of said Elmer E. Anderson and prior to the commencement of this action, such proceedings were duly had in the Probate Court in and for the
6 County of Hennepin, State of Minnesota, so that said Wells Fargo Trust Company, on the 2 day of Dec., 1921 was duly appointed Special Administrator of the Estate of said Elmer E. Anderson, deceased, and prior to the commencement of this action, duly qualified as such Special Administrator, and accepted the trust thereby created, and immediately entered upon the duties as such administrator, and now is acting as such administrator and brings this action as the personal representative of said deceased in the interest and

for the benefit of the heirs at law and next of kin 7
of said deceased.

II.

That said deceased at the time of his death was of the age of thirty one years; that he died intestate at Stanton, in the State of Iowa, on the 1st day of November, 1930; that said deceased, at the time of his death was a single man and left surviving him as his sole heirs at law and beneficiaries and next of kin, dependent upon him for support, the following persons, to wit Carolina Anderson, aged sixty one years, mother of said deceased, and Ada 8
C. Anderson, aged 31 years, sister of said deceased.

III.

Plaintiff further alleges that prior to its appointment as such Special Administrator, and on or about the 5 day of May, 1931, the mother of said deceased died, and that prior to her death, no action was brought or recovery had by the personal representative of said deceased, Elmer E. Anderson, for her benefit. That upon the death of said Carolina Anderson, mother of said Elmer E. An- 9
derson, the said Ada C. Anderson became and was left as the sole dependent next of kin of said Elmer E. Anderson.

IV.

Plaintiff further alleges that under the common law, as well as under the statute law of the State of Iowa, wherein said deceased Elmer E. Anderson died, said Ada C. Anderson, sister of said Elmer E. Anderson, was the next of kin

10 V.

Plaintiff further alleges that during all of said times, it was and is the statute law, as set out in the Code of Iowa, 1897, as follows, to wit:

"Section 3362. The personal property of the deceased, not necessary for the payment of debts, not otherwise, shall be distributed to the same persons and in the same proportions as though it were real estate."

"Share of Surviving Spouse dower. One third in value of all the legal or equitable estates in real
11 property, possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right shall be set apart as her property in fee simple, if she survive him. The same share of real estate of a deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife."

12 "Section 3378 Descent to children. Subject to the rights and charges herein provided, the remaining estate of which the decedent died seized, shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case, the heirs of such shall inherit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

"Section 3379 Wife and Parents. If the in-

testate leaves no issue, one half the estate shall 13
go to his parents and the other half to the spouse;
if no spouse, the whole shall go the parents."

"Section 3380. Surviving Parent. If one of the parents is dead, the portion which would have gone to such deceased parents shall go to the survivor, including the portion which would have belonged to the intestate's spouse, had one been living."

"Section 3381. Heirs of Parents. If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession of and ownership 14
of the portion thus falling to their share, and so on through ascending ancestors and their issue."

VI.

Plaintiff further alleges that prior to the death of plaintiff's intestate, Elmer E. Anderson, his father had died.

VII.

Plaintiff further alleges that during all of the times herein mentioned, the defendant, Chicago Burlington & Quincy Railroad Company was and 15
is a corporation, duly organized, created and existing under and by virtue of the laws of the state of Illinois as a railroad company, and as such owning, maintaining and operating a line and system of railroad extending through and between the states of Illinois, Iowa, Nebraska, Colorado, Minnesota and others unnecessary to be herein particularly mentioned, and that during all of said times, Stanton, in the State of Iowa, was a station

upon defendant's said line and system of railroad.

VIII.

Plaintiff further alleges that during all of said times, the defendant, in the operation of its said line and system of railroad was engaged in the business of commerce between the several states and territories of the United States and foreign countries as a common carrier by railroad and that at the time plaintiff's intestate was injured, as hereinafter alleged, and as a result of which injuries he died, he was in the employ of said defendant in its said business and commerce.

IX.

Plaintiff further alleges that on or about November 1st, 1929, the said Elmer E. Anderson was in the employ of said defendant in its said business as a fireman upon one of defendant's passenger trains, then being operated by it in its said business on said line and system of railroad at or near said Station, Iowa, and that while plaintiff's intestate was so employed and in the discharge of his duties as such fireman, defendant then and there so negligently and carelessly operated its said passenger train, its said line and system of railroad and other of its passenger trains and one of its freight trains, so that said different trains, or portions thereof, came into collision with each other, and so that all three trains were wrecked, and the track upon which plaintiff's intestate was employed as aforesaid was wrecked and derailed by reason of the negligence and carelessness of said defendant as hereinbefore alleged, while said train was there

ing at a high rate of speed, and as a result of said 19
wreck and derailment, all of which was due to the negligence and carelessness of defendant, plaintiff's intestate, said Elmer E. Anderson, was so severely and painfully injured, both externally and internally, so that he died as a result of said injuries on or about said November 1st, 1920, and that as a result of the injuries sustained by plaintiff's said intestate, he suffered grievous bodily and mental pain and anguish before he died.

X.

Plaintiff further alleges that at the time plain- 20
tiff's said intestate was injured, as hereinbefore alleged, he was a strong, healthy, able-bodied young man, aged thirty-one years, and earning and capable of earning the sum of approximately two hundred eighty ($280.00) dollars per month the greater portion of which he contributed to the support of his mother, Carolina Anderson, and his sister, said Ada C. Anderson, each of whom were dependent upon plaintiff's intestate.

XI

That by reason of the facts hereinbefore alleged, 21
plaintiff's intestate, and his said mother and sister, suffered and sustained general damages and pecuniary loss at the hands of said defendant in the sum of forty thousand (40,000.00) dollars, to recover which damages for the benefit of the said mother and sister of plaintiff's intestate, a cause of action has accrued to plaintiff as the personal representative of said Elmer E. Anderson, deceased.

22 Wherefore, plaintiff demands judgment against said defendant for the sum of forty thousand eighteen dollars, and for the costs and disbursements of this action.

TAUTGES, & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff,
726 S. McKnight Bldg.,
Minneapolis, Minnesota.

23 [illegible] In District Court.

STIPULATION

It is hereby stipulated and agreed by and between the parties of the above entitled action, that said action may be transferred to the District Court of Hennepin county, Fourth Judicial District, said state, for trial, and that said cause be placed on said calendar for trial for October 16th, 1922, in the said District Court of Hennepin county,

24 [illegible] Minnesota, for trial as a jury case, without the necessity of either party serving a notice of trial or a note of issue, and that the court may so order.

Dated September 16, 1922.

ROBT. J. McDONALD and
TAUTGES & WILDER
Attorneys for Plaintiff.

Dwinnell, McDermott, Sears & Weeks,
Attorneys for Defendant.

[Filed Sept. 22, 1922. Albert T. Olson, Clerk.]

(Title of Cause) 25

7th Judicial District

ORDER

Pursuant to the foregoing stipulation of the parties to the foregoing entitled action,

It is hereby ordered, that said action be transferred for trial to the District Court of Hennepin county, Fourth Judicial District, state of Minnesota, that the Clerk of the District Court of Hennepin county may place said cause on a jury calendar for trial the 16th day of October, 1922, as a jury case. That no notice of trial or note of issue 26
need be served or filed.

Dated September 23, 1922.

By the Court,

WILLIAM L. PARSONS,

Judge.

(Title of Cause) 4th Judicial District

AMENDED ANSWER

Now comes the defendant and for its amended answer to plaintiff's complaint herein 27

I

Admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and was and now is engaged in the business of manufacturing and conducting a flour business in the City of Minneapolis and elsewhere.

II

Admits that on or about the 1st day of November, 1920, [illegible] Anderson aforesaid, was in the

28 employ of the defendant as a fireman and at said time said Elmer E. Anderson, deceased, and the defendant were engaged and engaging in interstate commerce.

Admits that said Elmer E. Anderson, deceased died on the 1st day of November, 1920, that Caroline Anderson, the mother of deceased, died on the 5th day of May, 1924, that Ada C. Anderson is a sister of the deceased.

IV.

Admits that the father of Elmer E. Anderson
29 deceased, died prior to November 1, 1920.

V.

Admits that on the 1st day of November, 1920, the said Elmer E. Anderson, deceased, while employed as a fireman on one of defendant's trains was killed in a wreck with another of defendant's trains at Stanton, Iowa, that the death of said Elmer E. Anderson occurred without the fault or negligence of the employees of the defendant.

VI

30 Further answering plaintiff's complaint and for further defense thereto the defendant alleges:

That on the 1st day of November, 1920, at the time of the death of Elmer E. Anderson, deceased, the said Elmer E. Anderson deceased, was a resident of Union County, state of Iowa, that Caroline Anderson, the mother of deceased, and Ada C. Anderson, sister of deceased, were residents of said county and state, that on the 11th day of January, 1921, said Ada C. Anderson acting as deceased's

Iowa, sitting in Probate a court having jurisdic- 31
tion of the matter, for an order appointing said
Ada C. Anderson, sister of deceased, General Ad
ministratrix of the Estate of said deceased; that
thereupon the said Ada C. Anderson duly filed in
said court a bond duly approved by said court and
otherwise fully qualified as General Administra
trix of the estate of said Elmer E. Anderson, de
ceased; that on the 14th day of March, 1921, the
District Court of said Union county, Iowa, sitting
in probate duly issued to said Ada C. Anderson let
ters of administration; that said Ada C. Anderson
is now and ever since said time has been the duly 32
appointed, qualified and acting general adminis
tratrix of the estate of Elmer E. Anderson de
ceased.

That the Probate Court of Hennepin county, Minnesota, at the time of the appointment of plain tiff as special administrator of the estate of El mer E. Anderson, deceased, had no authority or jurisdiction to make such appointment on account of the fact that the District court of Iowa in and for Union County, sitting in Probate, having juri diction of the estate of the deceased prior to said 33
time and on the 17th day of January, 1921, ap pointed Ada C. Anderson general administratrix of said estate, that this court is without juris dic tion and has no authority to hear and determine the cause of action, if any, set forth in the com plaint.

Except as herein before admitted, alleged or spe cifically denied, defendant denies each and every allegation, matter and thing in plaintiff's com

34 plaint contained and each and every part and portion thereof, whether as therein alleged or otherwise or at all.

Wherefore, defendant demands judgment that this action be dismissed and that it have and recover its costs and disbursements herein.

DONOHUE, MCDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant,
801 Commerce Building,
St. Paul, Minnesota.

35 [Title of Cause] 4th Judicial District

REPLY

Plaintiff replying to the Amended Answer of the defendant herein

Denies each and every allegation, matter and thing set forth and contained in paragraph six of said amended answer.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

TAUTGES & WILDER and
ROBERT J. MCDONALD,
36 Attorneys for Plaintiff,
[illegible] McKnight Bldg.,
Minneapolis, Minn.

[Title of Cause]

NOTICE OF MOTION FOR NEW TRIAL

To the above named Defendant, and the Messrs. Donohue, McDermott, Stearns & Weeks, Its Attorneys:

Take notice that the above named plaintiff, will

forthwith move the above named court, and the 37
Honorable W. W. Bardwell, Judge thereof, before whom said cause was tried, for an order vacating and setting aside the order heretofore made, dismissing said cause and granting a new trial thereof upon the following grounds, to wit:

1. Errors of law committed on the trial of said cause by which plaintiff was and is aggrieved, and to which plaintiff duly excepted.

2. The court erred in sustaining the objection of defendant to the taking of testimony in said 38
cause.

3. The court erred in granting defendant's motion to dismiss said cause.

4. The court erred in dismissing said cause.

5. The dismissal of said cause is contrary to law.

6. The dismissal of said cause is contrary to the evidence.

Said motion will be made and based upon all of 39
the files, records, pleadings and proceedings in said cause, and upon the settled case heretofore allowed and certified by the court.

Dated January 15th, 1923.

TAUTGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff,
736 McKnight Bldg.,
Minneapolis, Minn.

40 (Title of Cause)

ORDER DENYING MOTION FOR NEW TRIAL

The above entitled matter came duly on to be heard before the undersigned judge of said court, on the 24th day of January, A. D. 1923, on motion of plaintiff for an order, vacating and setting aside the order heretofore made, dismissing said cause, or for a new trial thereof.

Messrs. Tautges & Wilder, and Robert J. McDonald of Minneapolis, Minnesota, appeared for plaintiff in support of said motion.

41 Messrs. Donegre, McDermott, Stearns & Weeks, appeared as attorneys for defendant in opposition thereto.

The Court, having duly considered the matters involved in said motion,

It is hereby Ordered, that the same be, and hereby is in all things denied.

Dated January 24, 1923.

By the Court,

W. W. BARDWELL,

Judge.

Filed 1-25-23.

42

(Title of Cause)

JUDGMENT AND DECREE.

September 6, 1923.

The above entitled action having been regularly placed upon the calendar of the above named court for the September, A. D. 1923, General Term thereof, came on for trial before the court and a jury duly impaneled and sworn to try the same on

the 27th day of November, A. D. 1922, said cause 43
was partially tried defendant having in open court moved for the dismissal of the above entitled action, and the court, being fully advised in the premises, did, on the 27th day of November, A. D. 1922 duly make its order granting said motion.

Now pursuant to said order and on motion of Messrs. Denegre, McDermott, Stearns & Weeks, attorneys for defendant, it is hereby adjudged and decreed that the above entitled action be and the same is hereby dismissed, and

That the defendant recover of the plaintiff the 44
sum of nine dollars costs and disbursements as taxed and allowed herein.

$9.00.
vs pltf.

By the Court,
WALTER A. RYBERG,
Clerk of District Court
By GORDON J. MANGAN,
Deputy.

(Title of Cause) 45

NOTICE OF APPEAL TO THE SUPREME COURT

To the above named Defendant, to Messrs. Denegre, McDermott, Stearns & Weeks, Attorneys for the above named Defendant and to Walter A. Ryberg, Clerk of said District Court:

Please take notice that the above named plaintiff appeals to the Supreme Court of the State of Minnesota from that certain judgment of the said

46 District Court entered herein on the 6th day of September, A. D. 1923, in favor of said defendant for the sum of nine thousand dollars, said judgment being a judgment on the merits and for costs, and from the whole thereof.

Dated this 16th day of November, 1923.

TAUGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff.

Due and personal service of the within notice of appeal is hereby admitted at St. Paul, Minnesota, this 23rd day of November, A. D. 1923 and appeal bond is hereby waived.

47 DOERR, McDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant.

Due and personal service of the within notice of appeal is hereby admitted at Minneapolis, Minnesota, this 26th day of November, A. D. 1923.

WALTER A. RYBERG,
Clerk of District Court of
Hennepin County, Minnesota.
By C. B. MAURER, Deputy.

48

Title of Cause.

SETTLED CASE.

This case came regularly on for trial before Hon. Winfield W. Bardwell, one of the judges of said court, with a jury, on the morning of November 27, 1922. Messrs. Tauges & Wilder and Mr. Robert J. McDonald appeared as attorneys for plaintiff and Messrs. Doerr, McDermott, Stearns & Weeks appeared as attorneys for defendant.

A jury was empaneled and sworn. 49

Mr. Tantgos stated the case for plaintiff to the jury.

Mr. Tantgos: Plaintiff's Exhibit A, which is a certified copy of the special letters of administration issued to the Wells Dickey Trust Company, is offered in evidence.

Mr. Stearns: No objection.

The Court: Received.

ADA C. ANDERSON,

sworn on behalf of plaintiff, testified:

By Mr. Tantgos: 50

Q. What is your full name?

Mr. Stearns: If the court please, the defendant objects to the taking of any testimony, and moves the court to dismiss this case on the grounds that the complaint does not state a cause of action. It appears conclusively from the pleadings that the deceased Anderson was in the employ of the defendant as a fireman, and that he and the defendant were engaged in interstate commerce on November 1, 1920, when Mr. Anderson was killed; 51
that he left surviving a mother, Caroline Anderson and a sister Ada Anderson; that his mother lived from the time of the death of Elmer Anderson until May 5, 1921, and then the mother died. It is admitted between the parties that the deceased, Anderson, was instantly killed and did not live any appreciable length of time. Under the admitted pleadings there can be no recovery in this case.

Recess until 2 P. M.

52 Afternoon session.

The Court: It seems to me that there was a vested right there which did not survive; that under the provisions of the Ohio case and the South Carolina case, in the absence of any statute, that they have adopted the same rule. If there was no dependent at the time of death at the expiration of six months, the only person for whose benefit the action might be brought does, and another party offers in evidence to be appointed. It hardly seems to be good reasoning that the cause of action would survive for that and not for the other. Except as I do it seems to me it would be rather absurd to pile up a record suit and then have to direct a verdict or set the verdict aside. If it is going to be determined, it should be determined upon this record. I think I will have to grant the motion. Motion granted and case dismissed.

53 Exception by plaintiff.

Stay of 60 days.

54 PLAINTIFF'S EXHIBIT "A."

State of Minnesota,

ss.

County of Hennepin.

Special Letters of Administration.

Whereas Dorcas Teigen applies to herein appointed Special Administratrix of the estate of Elmer L. Anderson, deceased.

Whereas, Hon. John A. Dahl, Judge of the Probate Court in the county of Hennepin and the seal

of the court, affixed the 27th day of December, 55
A. D. 1921.

By the Court,

JOHN A. DAHL,

Judge.

Probate Court Seal.

40633

State of Minnesota, Probate Court.

ss.

County of Hennepin.

I, James G. Kelso, clerk of the Probate Court, 56
within and for said county of Hennepin, and custodian of the seal and records of said court, do hereby certify that I have compared the foregoing copy of the record of the Special Letters of Administration, In the Matter of the Estate of Elmer L. Anderson, deceased, with the original records thereof now remaining in this office and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be re- 57
ceived in evidence in all the courts of the state of Minnesota.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Minneapolis, in said county this 27th day of November, A. D. 1922.

James G. Kelso,

Clerk of the Probate Court.

Probate Court Seal.

58 (Title of Cause).

STIPULATION

It is hereby stipulated and agreed by and between the parties to the foregoing entitled action, that the hereto attached transcript contains all of the evidence, proceedings, rulings, exceptions and exhibits except the complaint, amended answer and reply which may be referred to as a part of the record, had, taken and introduced upon the trial of said cause and that the same may be al-
59 lowed and certified by the court as the Settled Case and Bill of Exceptions herein.

Dated November 20th, 1922.

TAUTGES & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff.

DENEGRE, McDERMOTT, STEARNS & WEEKS,
Attorneys for Defendant.

60

(Title of Cause.)

ORDER ALLOWING AND CERTIFYING SETTLED CASE AND BILL OF EXCEPTIONS

The court having examined the hereto attached proposed Settled Case and Bill of Exceptions and the stipulation of the parties in reference thereto, and finding the same conformable to the truth,

It is hereby Ordered, that the same be and here 61
by is allowed as and for the Settled Case and Bill of Exceptions herein and the court certifies that said Proposed Settled Case and Bill of Exceptions contains all of the evidence, exhibits, proceedings, rulings and exceptions had taken and introduced upon the trial of said cause.

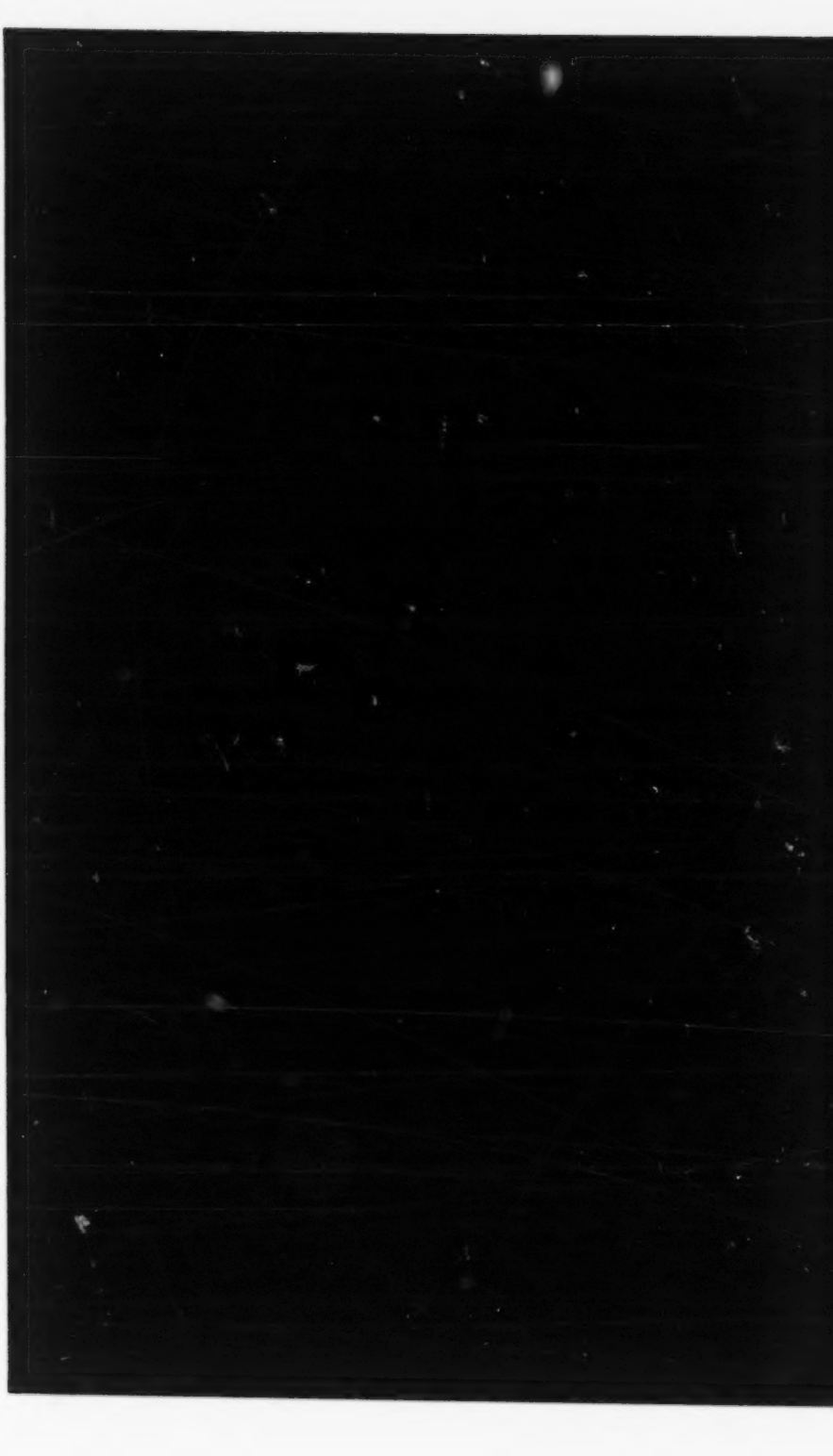
Dated December 23rd, 1922.

By the Court,

W. W. BARDWELL,

Judge.

62



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No. 167 Hennepin Co. Dibell, J. 1

Quinn, J. *dissent*

Endorsed
Filed May 29th, 1924.
Grace F. Kaercher,
Clerk.

2

Wells Dickey Trust Company, as Special Administrator, etc.

Appellant,

2348 —vs.—

Chicago, Burlington & Quincy Railroad Company,

Respondent.

SYLLABUS

3 The Federal Employers' Liability Act of April 22, 1908, 35 St. 65, c. 149, U. S. Comp. St. 1916, § 8657, creates in the personal representative of an employe killed by the negligence of a railroad company while employed in interstate commerce a right of action "for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." Held, that the personal representative may recover where the deceased employe leaves no wife nor child, but leaves

4 ...parent, who died after his death, and before action brought; and a dependent sister who is the ward of ... the proceeds in such case being for the benefit of such dependent sister.

Judgment reversed.

OPINION

Action to recover damages for the death of the plaintiff's decedent. There was judgment for the defendant and the plaintiff appeals.

The deceased, Ernest D. Anderson, was employed by the defendant as a carpenter helper. While so employed he was killed on November 1, 1926, in the performance of his employment by the defendant. He left surviving him his father and mother. His father died [illegible]. His mother survived him for about [illegible] May 9, 1931, prior to the commencement of this action. The deceased left [illegible] Ada C. Anderson, [illegible] dependent upon [illegible]. Since the commencement of this action [illegible]

Upon these facts appearing the [illegible] moved to dismiss upon the ground that the decedent's mother having survived him, was the sole beneficiary, and that upon her death there was no cause of action in the appellee's [illegible] to recover for the benefit of a [illegible] beneficiary.

We reach a different conclusion [illegible] the [illegible] weight of authority accords with the trial court's holding.

The Federal Employer's Liability Act of April [illegible], 1908, 35 St. at L. 65, U. S. Comp. St. 1916, § 8657, so far as here material, is as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of death of such employé, to his

or his personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." 7

The statute creates in the personal representative of the deceased employe a new right of action, one unknown to the common law, attended by a measure of damages strange to the old law but appropriate to the newly created right enforceable by the representative for the benefit of designated beneficiaries. Michigan Cent. R. Co. vs. Vreeland, 227 U. S. 59; American &c. Co. vs. Didrickson, 227 U. S. 145; Gulf &c. R. Co. vs. McGinnis, 228 U. S. 173; 8
North Carolina &c. R. Co. vs. Zachary, 232 U. S. 248; Garrett vs. Louisville &c. Ry. Co., 235 U. S. 308. The statute is not properly a survival statute. The amendment of April 5, 1910, 36 St. 291, c. 143, § 9, U. S. Comp. St. 1916, § 8665, is the survival statute.

The widow having died since the employe's death the question is whether his personal representative may maintain an action for the benefit of a remoter beneficiary. It is one of construction and is ultimately a federal one. It has not been decided, so far as we are advised, by either a federal or a state court. There are constructions of state 9
statutes, variant in their language and policy, helpful in the consideration of the federal act.

In Hammond vs. Lewiston &c. Ry. Co., 106 Me. 209, involving a statute of that state and a situation not substantially different from that before us, it is held that the widow having died there was no cause of action in the representative for the benefit of other beneficiaries. The same is held in Sanders vs. Louisville &c. R. Co., 111 Ved. 508, and Railroad vs. Bean, 94 Tenn. 388, both construing the Ten-

10 nessee statute; in Dillier vs. Cleveland &c. R. Co. 34 Ind. App. 52, construing a statute of Indiana similar to the federal statute; and in Woodward vs. Chicago &c. R. Co. 23 Wis. 400.

That there may be a recovery in situations like that presented here is held in Garrad vs. Mahoning Valley R. Co. 108 Ohio St. 212, and Morris vs. Spartanburg &c. R. Co., 70 S. C. 279. The Ohio statute creates an action in the representative "for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death

11 was so caused." In the Ohio case, the latest one called to our attention, the husband and wife were killed in a common accident, the wife surviving the husband by a few hours. The suit was by the administrator of the husband for the benefit of his parents and next of kin. Holding the action maintainable, the court said:

> "We think that our statute does not vest the cause of action in any particular class existing at that time, but that the cause of action, or the right to enforce liability, is distinctly vested in the personal representative of the deceased person in behalf of the class existing when the right is enforced by suit instituted by

12 such representative."

The South Carolina statute creates a right of action in the representative "for the benefit of the wife or husband and child or children of the person whose death has been so caused; and if there be no such wife or husband, or child or children, then, for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused, as may be dependent on him for support." In the South Carolina case the action was brought by the

father of the deceased as his administrator. The deceased 13
left no wife or child. The father, the sole beneficiary, died pending the action and before trial. The court, holding that the action did not abate and that a recovery could be had for the benefit of the remoter class, said:

> "We think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary, person or class named in the statute existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still the statute had other beneficiaries in contemplation in the event of his death. The brothers and 14
> sisters of the deceased named in the complaint are his heirs at law, and since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary. Under the statute, the action must be prosecuted in the name of the deceased's administrator, and he is living to carry on the action for the benefit of whoever may be entitled to participate in the distribution of such recovery as may be had."

The statutes of the different states vary in terms. In some a right of action is vested in an individual beneficiary or in a class of beneficiaries. The federal act vests it in the personal representative of the deceased. Suit is sometimes brought in the name of the beneficiary. Under the Federal act the beneficiary cannot sue. American &c. Co. vs. Birch, 224 U. S. 547; Pittman vs. St. Louis &c. R. Co., 188 F. 842. Under some statutes, indeed under a great many, it is held that the beneficiary takes a property right which passes upon his death as personal property. Under such a statute a remoter beneficiary of course cannot take. It is not claimed that the Federal act gives an inheritable right to a beneficiary. What is said in cases construing

16 such statutes is not very helpful here. Under other statutes it is held that the right of action vesting in the personal representative abates upon the death of the beneficiary or class of beneficiaries first entitled to take and living at the death of the employe and those in remoter class do not take. That is the contention of the defendant here. Cases involving the question discussed and many collateral ones are collected in 13 A. L. R. 225; 17 C. J. 1252; 8 R. C. L. 794; note 17 Ann. Cas. 773; Tiffany Death by Wrongful Act, § 80, et seq.

17 It may be noted that the Tennessee, Indiana and Wisconsin courts held the statutes under construction in the cases cited in derogation of common law and subject to strict construction. The construction placed by the Supreme Court upon the Federal act is not narrow or restricted. It has been held that the act is remedial and should have a liberal construction in advancement of the remedy. St. Louis &c. R. Co. vs. Conley, 187 F. 949; Behrens vs. Illinois Cent. R. Co., 192 F. 581; McNamara vs. Washington &c. Co., 37 App. D. C. 384; Baltimore &c. Co. vs. Branson, 128 Md. 678; Horton vs. Oregon &c. N. Co., 72 Wash. 503. There are many other cases of like effect. In Johnson vs. Southern Pac. R. Co., 196 U. S. 1, it was held that the Safety Appliance Act, aside from its penal provisions, was remedial in character, and should be accorded a fair construction to accomplish the results intended.

18 The Safety act was intended to change the common law and substitute what Congress deemed a more just legal relation between railroad employer and employe. Congress thought it wise to vest, in case of the employe's death, a right of action in his personal representative for the ben-

fit of relatives likely interested in the continuance of his life 19
and designated three classes. The statute represents Congressional policy. Liability is not imposed upon the carrier as a penalty. But when injury comes the carrier must pay upon the basis of the newly established rules, and if death ensues, dependents must be compensated to the extent determined by the statute. It is not thought that Congress had in mind that if the first named beneficiary died after the death of the employe a remoter beneficiary should not take and the carrier should be discharged of liability. It did not wish such result; and it is a fair construction that one class failing after the employe's death the cause of action resting 20
in the representative may be prosecuted for the benefit of the next class.

We do not stress much the doctrine of liberal construction, but does the holding of the Tennessee, Indiana and Wisconsin courts as to strict construction militate greatly against the results there reached. Likely the holding in those states would have been the same if the doctrine of strict construction had not been mentioned. The common law was radically changed by the liability statute. The statute was intended for the protection of the employe and his dependents. It inaugurated a new policy. It should 21
have a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law. The new law should be given a reasonable construction to the end that interstate employes and their dependents may be compensated, for that was the purpose of Congress.

Under our death by wrongful act statute, Ch. S. 1913, § 8176, the question before us cannot arise. It can arise under our Railway Employers' Liability Act, Laws 1915,

22 c. 187, as amended by Laws 1923, c. 333, which is couched in the language of the Federal act. Both should have the same construction. If our statute were to be construed now we would hold that the liability of the employer continues from class to class of beneficiaries upon a preceding class becoming non-existent through the death of its members after the death of the employe. The amount of damages recoverable may change but the liability continues. Without a federal holding we construe the Federal act as we would construe our statute.

Judgment reversed.

23 Dissent. The act creates but a single cause of action, which vests in the preferred beneficiary immediately upon the death of the employe. In the instant case, the mother was the sole beneficiary in the preferred class. She died May 5, 1921, six months subsequent to the death of the employe, without attempting the enforce her cause of action. In my opinion, the cause of action died with her. Under this statute the surviving dependent relative acquires a right of action at the time of the death of the employe or not at all.

24

TRANSCRIPT OF JUDGMENT

25

WELLS DICKEY TRUST COMPANY, a Corp., as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant,

23918 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that 26
the Judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Hennepin, be and the same hereby is in all things Reversed.

And it is further determined and adjudged that Appellant herein, do have and recover of Respondent, herein the sum and amount of Seventy six and 25 100 Dollars ($76.25) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 13, A. D. 1924.

BY THE COURT.

Attest: 27

GRACE F. KAERCHER,

Clerk.

STATEMENT FOR JUDGMENT

Statutory costs, $25.00.
Printer, $36.25.
Clerk, $10.00.
Return, $5.00.
Total, $76.25.

28 STATE OF MINNESOTA
SUPREME COURT } ss.

I, Grace F. Kaercher, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, June 13, A. D. 1924.

GRACE F. KAERCHER,
Clerk.

29 By PETER O. SCOW,
Deputy.

(SEAL)

24936

State of Minnesota
In Supreme Court

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased.

Respondent,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Appellant.

RECORD

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and
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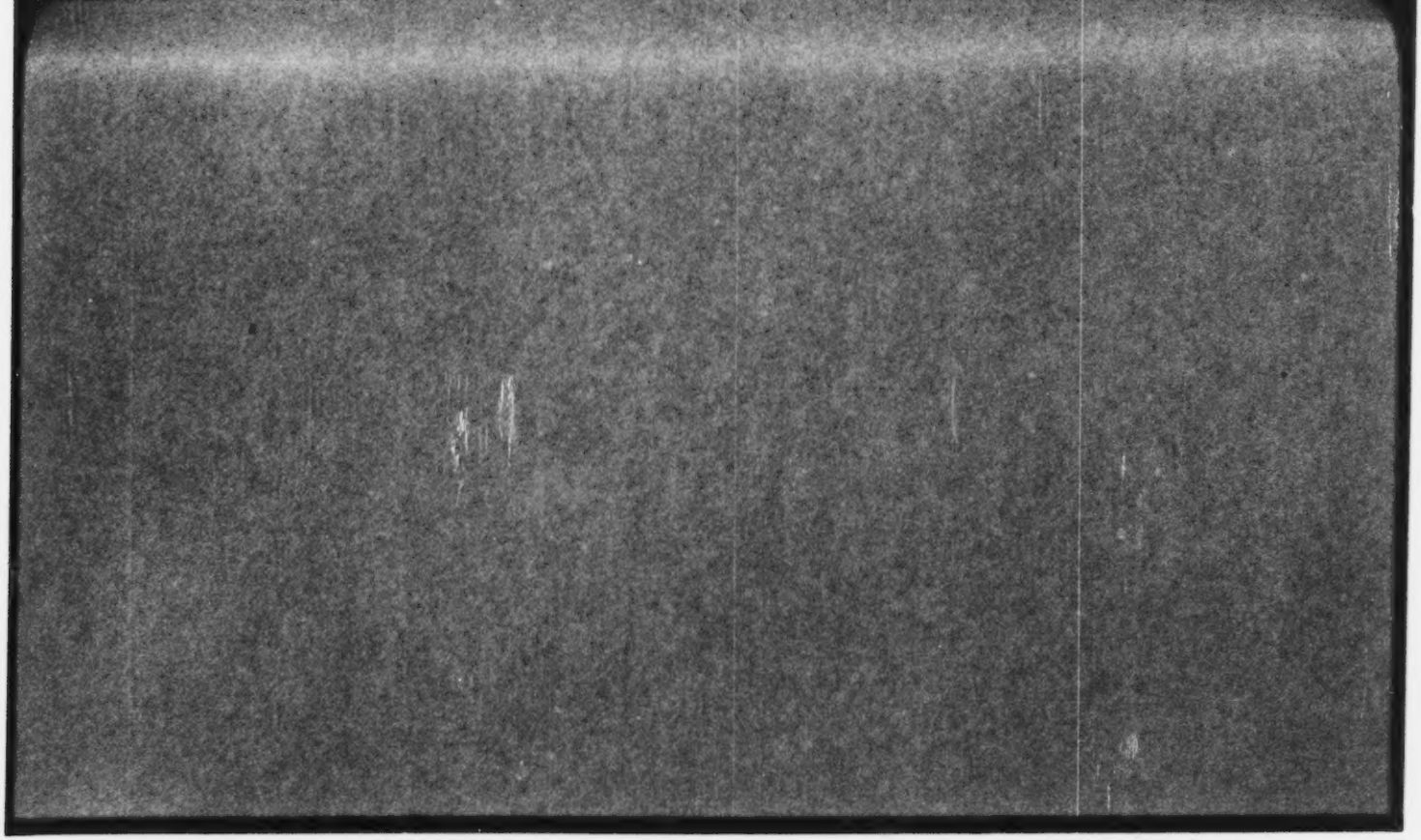

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State of Minnesota
Supreme Court

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased,

Plaintiff,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Defendant.

COMPLAINT.

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, as a Trust Com-

State of Minnesota
Supreme Court

STATE OF MINNESOTA, DISTRICT COURT,
County of Hennepin, Fourth Judicial District

2

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of ELMER E. ANDERSON, deceased,

Plaintiff,

vs.

CHICAGO, BURLINGTON, and QUINCY RAILROAD COMPANY,

Defendant.

COMPLAINT.

3

Plaintiff, for its cause of action against said defendant, alleges:

I

That during all of the times herein mentioned, plaintiff was and is a corporation duly organized, created and existing under and by virtue of the laws of the state of Minnesota, as a Trust Com-

4 ...ions and by reason of the authority granted to it as such corporation, it ever since has been and now is engaging in the business of conducting and maintaining a trust business in the City of Minneapolis, and elsewhere, that in connection with its business it is authorized to act as trustee and personal representative for and in behalf of deceased persons and their estates; that after the death of said Elmer E. Anderson and prior to the commencement of this action, such proceedings were duly had in the Probate Court in and for the 5 County of Hennepin, State of Minnesota, so that said Wells-Dickey Trust Company on the 27th day of Dec., 1921, was duly appointed Special Administrator of the Estate of said Elmer E. Anderson, deceased, and prior to the commencement of this action duly qualified as such Special Administrator and accepted the trust thereby created, and immediately entered upon its duties as such administrator, and now is acting as such administrator and brings this action as the personal representative of said deceased in the interest and 6 for the benefit of the heirs at law and next of kin of said deceased.

II

That said deceased at the time of his death was of the age of thirty-one years; that he died in Iowa City, Johnson County, Iowa, on the 1st day of November, 1920; that said deceased, at the time of his death was a single man and left surviving him as his sole heirs at law and next of kin

and next of kin, dependent upon him for support, 7
the following persons, to-wit: Carolina Anderson, aged sixty one years, mother of said deceased, and Ada C. Anderson, aged 31 years, sister of said deceased.

III.

Plaintiff further alleges that prior to its appointment as such Special Administrator, and on or about the 5th day of May, 1921, the mother of said deceased died, and that prior to her death, no 8
action was brought or recovery had by the personal representative of said deceased, Elmer E. Anderson, for her benefit. That upon the death of said Carolina Anderson, mother of said Elmer E. Anderson, the said Ada C. Anderson became and was left as the sole dependent next of kin of said Elmer E. Anderson.

IV.

Plaintiff further alleges that under the common law, as well as under the statute law of the State of Iowa, wherein said deceased Elmer E. Anderson 9
died, said Ada C. Anderson, sister of said Elmer E. Anderson was his next of kin.

V.

Plaintiff further alleges that during all of said times, it was and is the statute law, as set out in the Code of Iowa, 1897, as follows, to-wit:

"Section 3362. The personal property of the deceased, not necessary for the payment of debts,

10 nor otherwise, shall be distributed to the same persons and in the same proportions as though it were real estate."

"Share of Surviving Spouse-dower. One third in value of all the legal or equitable estates in real property, possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her right shall be set apart as her property in fee simple, if she survive him. The same share of real estate of a
11 deceased wife shall be set apart to the surviving husband. All provisions made in this chapter in regard to the widow of a deceased husband shall be applicable to the surviving husband of a deceased wife."

"Section 3378. Descent—to children. Subject to the rights and charges herein provided, the remaining estate of which the decedent died seized, shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case, the heirs of such shall in-
12 herit his or her share in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents."

"Section 3379. Wife and Parents. If the intestate leaves no issue, one-half the estate shall go to his parents and the other half to the spouse; if no spouse, the whole shall go to the parents."

"Section 3380. Surviving Parent. If one of the parents is dead, the portion which would have gone to such deceased parents shall go to the sur-

vivor, including the portion which would have be- 13
longed to the intestate's spouse, had one been living."

"Section 3381. Heirs of Parents. If both parents are dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession of and ownership of the portion thus failing to their share, and so on through ascending ancestors and their issue."

14

VI.

Plaintiff further alleges that prior to the death of plaintiff's intestate, Elmer E. Anderson, his father had died.

VII.

Plaintiff further alleges that during all of the times herein mentioned, the defendant, Chicago, Burlington & Quincy Railroad Company was and is a corporation, duly organized, created and ex- 15
isting under and by virtue of the laws of the state of Illinois as a railroad company, and as such owning, maintaining and operating a line and system of railroad extending through and between the states of Illinois, Iowa, Nebraska, Colorado, Minnesota and others unnecessary to be herein particularly mentioned, and that during all of said times, Stanton, in the State of Iowa, was a station upon defendant's said line and system of railroad.

16 Plaintiff further alleges that during all of said times, the defendant, in the operation of its said line and system of railroad was engaging in the business of commerce between the several states and territories of the United States and foreign countries as a common carrier by railroad and that at the time plaintiff's intestate was injured, as hereinafter alleged, and as a result of which injuries he died, he was in the employ of said defendant in its said business and commerce.

17 IX

Plaintiff further alleges that on or about November 1st, 1920, the said Elmer E. Anderson was in the employ of said defendant in its said business as a fireman upon one of defendant's passenger trains, then being operated by it in its said business on said line and system of railroad at or near said Stanton, Iowa, and that while plaintiff's intestate was so employed and in the discharge of his duties as such fireman, defendant then and there
18 so negligently and carelessly operated its said passenger train, its said line and system of railroad another of its passenger trains and one of its freight trains, so that said different trains, or portions thereof, came into collision with each other, and so that all three trains were wrecked, and the train upon which plaintiff's intestate was employed as aforesaid was wrecked and derailed by reason of the negligence and carelessness of said de-

fendant as hereinbefore alleged, while said train 19
was moving at a high rate of speed, and as a result of said wreck and derailment, all of which was due to the negligence and carelessness of defendant, plaintiff's intestate, said Elmer E. Anderson, was so severely and painfully injured, both externally and internally, so that he died as a result of said injuries on or about said November 1st, 1920, and that as a result of the injuries sustained by plaintiff's said intestate, he suffered grievous bodily and mental pain and anguish before he died.

20

X.

Plaintiff further alleges that at the time plaintiff's said intestate was injured, as hereinbefore alleged, he was a strong, healthy, able bodied young man, aged thirty-one years, and earning and capable of earning the sum of approximately two hundred eighty ($280.00) dollars per month, the greater portion of which he contributed to the support of his mother, Carolina Anderson, and his sister, said Ada C. Anderson, each of whom were 21
dependent upon plaintiff's intestate.

XI.

That by reason of the facts hereinbefore alleged, plaintiff's intestate, and his said mother and sister, suffered and sustained general damages and pecuniary loss at the hands of said defendant in the sum of forty thousand ($40,000.00) dollars, to recover which damages for the benefit of the said

22 mother and sister of plaintiff's intestate, a cause of action has accrued to plaintiff as the personal representative of said Elmer E. Anderson, deceased.

Wherefore, plaintiff demands judgment against said defendant for the sum of forty thousand ($40,000.00) dollars, and for the costs and disbursements of this action.

TAUTGES & WILDER and
ROBT. J. McDONALD,
Attorneys for Plaintiff.
23 726 S. McKnight Bldg.,
Minneapolis, Minnesota.

(Title of Cause.)

AMENDED ANSWER

Now comes the defendant and for its amended answer to plaintiff's complaint herein:

I.

24 Admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and was and now is engaged in the business of maintaining and conducting a trust business in the City of Minneapolis and elsewhere.

II

Admits that on or about the 1st day of November, 1920, Elmer E. Anderson, deceased, was in the

employ of the defendant as a fireman and at said 25
time said Elmer E. Anderson, deceased, and the defendant were engaged and engaging in interstate commerce.

Admits that said Elmer E. Anderson, deceased, died on the 1st day of November, 1920; that Carolina Anderson, the mother of deceased, died on the 5th day of May, 1921; that Ada C. Anderson is a sister of the deceased.

IV.

Admits that the father of Elmer E. Anderson, 26
deceased, died prior to November 1, 1920.

V.

Admits that on the 1st day of November, 1920, the said Elmer E. Anderson, deceased, while employed as a fireman on one of defendant's trains was killed in a wreck with another of defendant's trains at Stanton, Iowa; that the death of said Elmer E. Anderson, deceased, was caused by the negligence of the employes of the defendant.

27

VI.

Further answering plaintiff's complaint and for further defense herein the defendant alleges:

That on the 1st day of November, 1920, at the time of the death of Elmer E. Anderson, deceased, the said Elmer E. Anderson, deceased, was a resident of Union county, State of Iowa; that Carolina Anderson, the mother of deceased, and Ada C. Anderson, sister of deceased, were residents of

said county and state; that on the 17th day of January, 1921, said Ada C. Anderson, sister of deceased, petitioned the District Court of Union county, Iowa, sitting in Probate, a court having jurisdiction of the matter, for an order appointing said Ada C. Anderson, sister of deceased, General Administratrix of the Estate of said deceased; that thereupon the said Ada C. Anderson duly filed in said court a bond duly approved by said court and otherwise fully qualified as General Administratrix of the estate of said Elmer E. Anderson, deceased; that on the 14th day of March, 1921, the District Court of said Union county, Iowa, sitting in probate duly issued to said Ada C. Anderson letters of administration; that said Ada C. Anderson is now and ever since said time has been duly appointed, qualified and acting general administratrix of the estate of Elmer E. Anderson, deceased.

That the Probate Court of Hennepin county, Minnesota, at the time of the appointment of plaintiff as special administrator of the estate of Elmer E. Anderson, deceased, had no authority or jurisdiction to make such appointment, on account of the fact that the District Court of Iowa in and for Union county, sitting in probate, having jurisdiction of the estate of the deceased prior to said time and on the 17th day of January, 1921, appointed Ada C. Anderson general administratrix of said estate, that this court is without jurisdiction and has no authority to hear and determine

the cause of action, if any, set forth in the com- 31
plaint.

Except as hereinbefore admitted, alleged or specifically denied, defendant denies each and every allegation, matter and thing in plaintiff's complaint contained and each and every part and portion thereof, whether as therein alleged or otherwise or at all.

Wherefore, defendant demands judgment that this action be dismissed and that it have and recover its costs and disbursements herein.

DENEGRE, McDERMOTT, STEARNS & WEEKS, 32
Attorneys for Defendant,
901-6 Commerce Building,
St. Paul, Minnesota.

(Title of Cause.)

REPLY.

Plaintiff replying to the Amended Answer of the defendant herein

Denies each and every allegation, matter and 33
thing set forth and contained in paragraph six of said amended answer.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

TAUTGES & WILDER and
ROBERT J. McDONALD,
Attorneys for Plaintiff,
726 S. McKnight Bldg.,
Minneapolis, Minn.

34 (Title of Cause.)

SETTLED CASE.

This action came on for trial before Hon. Paul W. Guilford, Judge, at the court house in the City of Minneapolis, Minnesota, on November 25, 1924, at 10 o'clock a. m.

Jury was impaneled and after examination a trial jury was secured and sworn to try the action. The following proceedings were had:

35

ADA C. ANDERSON,

being duly sworn in behalf of plaintiff, testified as follows, examined by Mr. Miner:

Q. What is your name?

Mr. Stearns: The defendant now objects to the taking of any testimony and moves the Court to dismiss this action on the ground that it appears from the pleadings conclusively that the parties, at the time of the death of Anderson, were engaged in interstate commerce under the Federal
36 Employers' Liability Act; it appears that deceased left no widow or children of the first class of beneficiaries but did leave a mother, who survived him, that prior to the commencement of this action the mother died. It appears from the pleadings, therefore, that the cause of action, if any, vested in the mother and her personal representative and can not be maintained by this plaintiff for the benefit of the sister, of the third class of beneficiaries.

The Court: Objection is overruled. 37

Mr. Stearns: Exception.

A. Ada C. Anderson.

Mr. Miner:

Q. Your age is what?

A. At the present time?

Q. Yes.

A. 33 years old.

Q. You were a sister of Elmer C. Anderson,—what was his name?

A. Elmer E. Anderson.

Q. Elmer E. Anderson? 38

A. Yes, sir.

Q. And at the time that he received these injuries resulting in his death where were you living?

A. At home, at Creston, Iowa, with my mother and brother.

Q. And at the time that he received these injuries who composed the members of your family?

A. My mother, my brother and myself.

Q. That is, this brother, Elmer E. Anderson, who was killed? 39

A. Yes, sir.

Q. And at that time your mother was of what age?

A. 62 years.

Q. And at the time that the brother met with this accident, what was his age?

A. He was 31 years and 8 months and some days, I don't just recall.

Q. Do you know about how long he had been

40 engaged in railroad service at the time that he met with this accident?

A. Well, he was a fireman, I know, for 8 years, and prior to that he worked in some other capacity for the railroad, for the Burlington.

Q. So that for more than 8 years he had been in the employ of the railroad?

A. Yes, sir.

Mr. Stearns:

Q. You mean the Burlington, he had been in the employ of the Burlington?

41 A. Yes, sir.

Mr. Miner:

Q. At the time that he met with this accident, for how long had you been living in this same home at that time?

A. 3 years and 8 months, about.

Q. And prior to the 3 years and 8 months that you speak of, where had you been?

A. In Chicago.

Q. And what were you doing in Chicago?

A. Employed.

42 Q. Working for wages?

A. Yes, sir.

Q. Supporting yourself?

A. Yes, sir.

Q. About what time did you leave the home at Creston to go to Chicago?

A. After my mother's death in the fall—

Q. No, no, the first time, I mean, when you first went to Chicago.

A. Well, I think it was 1910 or 1911.

Q. And at that time who composed the mem- 43
bers of the family at home?

A. My father, mother, two brothers and sister and myself.

Q. And the two brothers, that included this brother, Elmer E. Anderson, who was killed?

A. Yes, sir.

Q. And for how long were you absent from the home at that time, during what period of time?

A. About 6 years.

Q. And then about 3 years and 8 months be- 44
fore the brother met with this accident, did he come to Chicago to see you?

A. Yes, sir.

Q. And did he see you at that time?

A. Yes, sir.

Q. Who was with him when he came to Chicago, if any one?

A. My sister that is now deceased.

Q. And what was her age at that time?

A. She was 16 years old.

Q. She was 16 and you were a little older than she was?

45

A. Yes, sir.

Q. The brother and this sister saw you in Chicago?

A. Yes, sir.

Q. Where?

A. At the place where I was staying; they stayed there while they were on their visit there, their trip.

Q. You mean at some boarding place?

46 A. No, with a lady I was living with, Mrs. Le Clair.

Q. At the place where you made your home while you were in Chicago?

A. Yes, sir.

Q. Who was present at the time that your brother saw you at Mrs. Le Clair?

A. Mrs. Le Clair, and my sister, brother and myself.

Q. Then the four of you were present?

A. Yes, sir.

47 Q. State what, if anything, was said between you and your brother on that occasion with reference to your returning home.

Mr. Stearns: Objected to as incompetent, immaterial and irrelevant; incompetent as it tends to prove the statement of a deceased person regarding a future contract or mode of living.

The Court: Objection overruled.

Mr. Stearns: Exception.

Mr. Miner:

Q. I will change the form of the question. Did
48 you have some talk with your brother at that time in the presence of Mrs. Le Clair and the sister?

A. Yes, sir.

Q. And as a result or after this talk with the brother did you still continue in Chicago?

A. No, sir, I left for my home.

Q. What did you do afterwards, after this brother was there?

A. I went home to my brother and my mother and my sister.

Q. In Creston, Iowa? 49

A. In Creston, Iowa, yes, sir.

Q. And at the time that you returned home from Chicago, returned to your home in Creston, who were then the members of the family after you returned?

A. My mother, brother, sister and myself.

Q. Just the four of you?

A. Yes, sir.

Q. What had become of the other brother that you speak of?

A. He was married before that, he left home. 50

Q. At that time he was a married man?

A. Yes, sir, and away from home.

Q. And maintaining a home of his own with his family, was he?

A. Yes, sir.

Q. After you returned to Creston, Iowa, did you continue thereafter to be a member of the family?

A. Yes, sir.

Q. And what, if, any, support or contribution did your brother make to you after you returned 51 home?

A. He told me that he—

Q. No, what did he give you, what contribution did he make?

A. He gave me from $15 to $20 every week.

Q. How often?

A. Every week.

Q. And for how long did he continue those contributions?

52 A. Up to the time of his death.

Q. Do you know approximately what he was earning during that period of time, per month?

Mr. Stearns: We have got the earnings all here.

Mr. Miner: That is all agreed upon?

Mr. Stearns: Yes, we will stipulate those.

Mr. Miner:

Q. Do you know what the custom of your brother was with reference to his earnings from month to month as he received them from the de-

53 fendant?

Mr. Stearns: Objected to as incompetent, calling for a conclusion of the witness.

The Court: Objection is overruled.

Mr. Stearns: Exception.

A. Yes, sir.

Q. What, if anything, did he do with his earnings, from month to month, above that portion which he gave to you?

A. He gave to my mother, with the exception of what he kept out for his own personal needs.

54 Q. And state whether or not that was his custom and practice—

The Court: How much did he give to the mother?

A. It varied according,—you know he was paid according to the mileage. Sometimes his check was larger than sometimes, all depended on mileage. He was the support of the family.

Mr. Stearns: I ask that the answer be stricken out.

The Court: Stricken out as not responsive. 55

(Question is read by the reporter).

Mr. Miner:

Q. During the 3 years and 8 months that you have spoken of, was that customarily what he did right along during that period?

A. Yes, sir.

Q. Do you know whether or not your brother had been promoted in the service just before he met with this accident?

A. Yes, sir.

Q. Had he been promoted? 56

Mr. Stearns: Just a minute. Objected to as incompetent, calling for a conclusion of the witness, the answer must necessarily come from hearsay.

The Court: If she knows I suppose she might answer.

Mr. Stearns: May I ask a question in cross-examination?

The Court: Yes.

Mr. Stearns:

Q. Where did you get that information from? 57

A. I was at home during the time he was studying and I was at home when he left for his examination and when he came back and told me personally that he had passed his examination and was expecting the next day to take his first run.

Mr. Stearns: I object to the testimony on the ground that it is hearsay.

Mr. Miner:

Q. Did you see any document or statement of

58 any kind from the defendant relating to his advancement?

Mr Stearns: Objected to as not the best evidence.

The Court: Objection is overruled.

A. Yes, sir.

Q What was it that you saw?

Mr Stearns: Just a minute, that is objected to as not the best evidence.

The Court: The question asks for the nature of the document and the general contents of it?

59 Mr Miner: No, just the general nature.

Q What was it you saw from the company that you speak of with reference to this advancement?

A He had literature there that showed that he had passed.

Mr Stearns: I move that the answer be stricken out as incompetent and hearsay.

The Court: I think the answer was not responsive, it may be stricken out.

Mr Miner:

Q What sort of a document was it that you
60 saw from the defendant railroad company that bore upon those questions of his advancement from fireman to engineer?

A I didn't pay much attention only what he told me. He showed me some things there, I didn't pay much attention to it.

The Court: You don't know what the document was?

Mr Miner:

Q You don't know what the document was?

A No, sir, I don't. 61

Q Now, Miss Anderson, what was the state of your brother's health prior to the time that he received this injury, as to whether he was a well, strong man, or otherwise?

A He was a well, strong man.

Q What were your brother's habits in life, as to whether or not he was a sober, industrious man or otherwise?

A He was a sober, industrious man.

Q What were his habits with reference to being extravagant or economical in his personal 62
expenditures and his manner of living?

A He was economical, he was a home man.

Q Do you have any knowledge of approximately the amount of money that he expended for his own personal necessities or wants from each of his monthly earnings, not accurately, probably, but approximately, the amount which he would expend for his own personal wants from month to month?

A I can't give that exactly only he was not an extravagant man. He only needed very little, for 63
when he left on his runs for the other end, that was the only expense he was under outside of his clothing and that was not beyond reason.

Q State whether he had any expensive habits of any kind?

A No, sir.

Q Whether he smoked and drank or anything of that kind?

A No, sir.

64 Q. Whether or not he was extravagant or economical in his manner of dress?

A. No, sir.

Q. Was he extravagant or was he economical, which?

A. Economical.

Q. Whether or not, with the exception of the sums which he expended necessarily for his own requirements, the remainder of his earnings were contributed to you and the mother?

A. Yes, sir.

65 (At this time recess was taken until 2 o'clock, at which time the trial was resumed.)

Q. Shortly after you returned to your home on the first occasion, after your meeting with your brother in Chicago, state whether or not the health of this sister that you have spoken of became impaired.

A. Yes, sir, it did.

Q. Just tell the jury about that, what occurred with reference to her health?

The Court. When was that?

66 Mr. Miner. Just shortly after she came back to the home from Chicago, after the talk with her brother.

Mr. Stearns. I don't see how that is material, if the Court please, we are raising no issue about—

The Court. Why is that material?

Mr. Miner. I don't know as it is material. I thought I would offer the proof and if counsel objects to it I will withdraw the question.

The Court: There is no doubt that she since died? 67

Mr. Miner: Yes, she died very shortly after.

The Court: I suppose there is no objection to it.

Mr. Stearns: I don't care to go into details how she died, as long as she died.

Mr. Miner: I will withdraw the question.

Q. Did this sister who was present with the brother in Chicago on the occasion that you have spoken of, have a fatal illness and pass on shortly after you returned home? 68

A. She did.

Q. How long after?

A. She passed on about five or six months after I returned home.

Q. What was the state of your mother's health at the time that you returned to the home from Chicago?

A. Very poorly.

Q. And whether or not she continued in the poor state afterwards or did she recover?

A. No, sir, she had chronic trouble. 69

Q. Of the heart?

A. Yes, sir, she had heart trouble.

Q. And she survived the death of your brother how long?

A. About six months.

CROSS EXAMINATION

By Mr. Stearns:

Q. Miss Anderson, you are 32 now?

70 A. Yes, sir.

Q. What year did you say you first went to Chicago?

A. In either 1910 or 1911.

Q. So you were about 19 years of age when you first went to Chicago?

A. Well, I didn't figure the age. My brother was killed in 1920; I came home in 1917.

Q. Well, about 1910 or 1911 you went to Chicago?

A. I judge so.

71 Q. What part of the year in 1917 did you return home?

A. In February or March.

Q. And had you been living in Chicago continuously from 1910 up to 1917, February or March?

A. With the exception of the times that I went home. They sent for me several times in between that time.

Q. And you had been working in Chicago all

72 that time?

A. Yes, sir.

Q. Your mother's health, you say, had been poor?

A. Yes, sir.

Q. And you went home to take care of her?

A. Yes, sir.

Q. Your brother had paid you how much, $15 and $20 every week?

A. Yes, sir.

Q. Was that paid to you weekly or monthly or 73
semi-monthly?

A Well, he was paid semi-monthly, therefore I got it semi-monthly, but it was agreed so much every week.

Q Was it always the same amount?

A Sometimes it was more, depending on his salary.

Q Did he own the home in which you were living?

A That was in my mother's name.

Q Did he pay for the upkeep of the home? 74

A. Yes, sir.

Q And the repairs of the place?

A. Yes, sir.

Q Bought your mother's clothes?

A. Yes, sir.

Q Also bought your clothes?

A. He gave me the money and I bought my own clothing.

Q Did he furnish the household necessities?

A. Yes, sir.

Q And everything in the place and the light? 75

A With the exception of the times that with my money that he gave me that if I wanted to buy any gift for my mother that I thought would please her I bought it.

Q And in return you took care of your mother?

A Yes, sir.

Q And you took care of the house?

A Yes, sir.

Q And you did the cooking?

76 A. Yes, sir.

Q. And you ran the house?

A. Yes, sir.

Q. You also started in taking care of your brother?

A. Yes, sir.

Q. You cooked for him while he was at home?

A. Yes, sir.

Q. Was the sum of $15 or $20 a week he paid you for the services you rendered?

A. Yes, sir.

77 Q. That is right, isn't it?

A. Yes, sir.

Q. In Chicago, did you work at one place all the time that you were in Chicago?

A. No, sir.

Q. What different places did you work at?

Mr. Miner: That is objected to as immaterial.

The Court: It was gone into on direct examination that she worked in Chicago.

Mr. Stearns: It is proper under the statute and just to save time I will put it in now.

Mr. Miner: All right.

78 Mr. Stearns:

Q. What different places did you work at?

A. I worked for Sheer Brothers as cashier.

Q. How long?

A. Well, I worked for him off and on.

Q. Approximately how long?

A. For 5 or 6 years.

Q. And when did you leave him?

A. In the fall of 1916.

Q. And what were you being paid for your 79
time?

Mr. Miner: That is objected to as immaterial.

Mr. Stearns: I would like to have this testimony go in subject to being stricken out if the Court finds it is not material. My object in offering this testimony is to show that her arrangement in going back was not because she was in condition of being dependent but of her own free will and under her arrangement and I think it is material.

The Court: Your purpose, you say, is to show that she went back of her own free will? 80

Mr. Stearns: I want to show that she went back of her own free will and she was not in condition to be dependent or entitled to be dependent.

(Discussion by court and counsel.)

Mr. Stearns: Defendant offers to prove that Miss Anderson from 1910 until 1917 was employed in the City of Chicago, Illinois, and that during the first part of her employment she made $24 per week, and at the time of going back to Creston, Iowa, in 1917, she was making a salary of $33 per week and had been making that salary for some 81
time prior thereto, or from 1910 to 1917 she was employed continuously at Chicago at a salary not less than $24 per week and not over $33 a week.

Mr. Miner: That is objected to as wholly immaterial and as offering no basis for recovery here, which is just simply upon the question of contributions and reasonable expectancy as to their continuation.

The Court: Objection sustained.

82 Mr. Stearns: Exception. You are not raising the point that it is not proper cross-examination?

Mr. Miner: And not proper cross-examination.

Mr. Stearns: Then I will wait and put her on the stand later and make the same offer.

Mr. Miner: I will make the same objection then outside of that.

Mr. Stearns:

Q. Your mother was 62 years of age?

A. Yes, sir.

Q. At the time of her death?

83 A. Yes, sir.

Q. Or at the time of your brother's death?

A. She only lived six months afterwards, so it was in the same year.

Q. Had you worked in Creston other than in the home of your mother and brother between 1917 and the time of his death?

A. Only during the time that the flu broke out, that they were in need of nurses and the doctor that took care of my sister asked me to help him out.

84 Q. You did not work regularly?

A. No, that was no regular salary, just charity for what I did.

Q. Did you handle the finances of the home, that is, make the expenditures?

A. Yes, sir.

Q. I presume your mother had nothing to do with buying the groceries?

A. I did the buying of the groceries with the exception of the time that she did the buying, we

worked together. 85

Q. You made the payments for the groceries, did you?

A. Out of my mother's money.

Q. Your brother paid for everything in the line of his amusements, his clothing and the like?

A. He took care of that himself.

Q. And also when he was away?

A. I took care of that.

Q. At any time were the payments more than $15 or $20 per week?

A. It all depended on his salary and what I 86
needed. If I wanted to get anything he would give me that much more.

Q. So his giving you amounts of money depended on what you needed for the house?

A. No, what he gave me was to help me along. I couldn't stay there for nothing, you know, and I had to have a little spending money for myself and my clothes, and a man don't understand that. So he agreed to give me enough for my clothing and spending money, etc. We worked together in a family budget and everything went together. If 87
I wanted to buy anything for my mother in the line of furniture, if I had any extra money I would put it in. We worked together as a family.

Q. And in return for this money you rendered your services and took care of the household?

A. I acted as the manager of the household.

Q. You rendered your personal services?

A. Yes, sir. I rendered my services but I wasn't hired by the day or week.

88 Q I understand, there was no set sum of money; he gave you for your services whatever he felt he could afford to give and whatever you needed?

A Yes, sir.

RE DIRECT EXAMINATION

By Mr Minor:

Q Do you mean, Miss Anderson,—let us get this so the jury will understand it,—do you mean that the understanding between your brother and
89 yourself was that you were to work there in the home as a servant for a salary?

A Positively no, I was not a servant.

Q Or do you mean that he was contributing to you as a sister for your services?

A Yes, sir.

Q To enable you and help to support yourself?

A Yes, sir.

RE CROSS EXAMINATION

By Mr Stearns:

Q You went back to Iowa to take care of your
90 mother?

A My mother and sister, they were both sick, yes, sir.

Q And your brother was paying for your services rendered to your mother and sister and to him?

A Well, if you term it services, I couldn't say that. He agreed to pay me so I wouldn't be in want and I could depend on him for my upkeep.

Q Provided—

A. But he didn't pay me as a servant. I wasn't 91
hired as a servant because I was a member of the family.

Q. I understand that, but he agreed to pay you provided you would come back and take care of them?

A. He agreed to provide for me if I came back and stayed at home, as I did.

Q. In other words, if you had continued working in Chicago and had not gone home to your mother, he would not have paid you $15 or $20 a week, would he? 92

A. No, sir.

MARY LECLAIR,

being duly sworn in behalf of plaintiff, testified as follows, examined by Mr. Miner:

Q. What is your name?

A. Mary LeClair.

Q. You live where?

A. At the present time, Chicago, Illinois.

Q. You know Miss Anderson, who just left the stand, do you? 93

A. I do.

Q. How long have you known her?

A. Since 1910.

Q. Did you hear her testimony as to a visit paid to her in Chicago by her brother and sister?

A. I did.

Q. That occurred at your home?

A. Yes, sir.

Q. You recollect that occasion?

94 A. I do.

Q. Who were present at the time that this meeting took place?

A. Elmer Anderson, Ada Anderson and Inez Anderson.

Q. And yourself?

A. Myself.

Q. What year was it, do you recollect?

A. In 1916, in the fall.

Q. What did Mr. Anderson say to his sister with reference to her coming home on that occa-
95 sion, if anything?

Mr. Stearns: That is objected to as incompetent, immaterial and irrelevant and hearsay.

The Court: This is a conversation with a deceased person, but by a person who is not a party to this action.

Mr. Miner: Certainly not within the rule prohibiting conversation of that kind.

The Court: The only question is whether it is hearsay evidence, an exception to the rule of hearsay evidence.

Mr. Stearns: It could only come under an exception of the rule of hearsay as part of the res gesta but this is long prior to his death.

Mr. Miner: We think it is competent and we ask the Court to take the proof.

The Court: Objection is overruled.

Mr. Stearns: Exception.

A. He told her to come home and take care of the house and he would pay her a great deal more money than she could earn in Chicago, and in the

event of the mother passing out, if she would still 97
keep his home she could depend on him for the future.

Mr. Stearns: We object to the latter part of that.

The Court: Objection is overruled.

Mr. Stearns: Exception.

CROSS EXAMINATION

By Mr. Stearns:

Q You say that he told her that if she would come home and take care of the house and his 98
mother that he would pay her more than she could earn in Chicago?

A. Yes, sir.

Q You have heard her testify as to what he paid her, haven't you?

A. Yes, sir.

Q And you know, don't you, that she was earning far more money in Chicago than that?

A. No, I don't.

Q You don't know for whom she worked?

A I know for whom she worked and she was 99
not earning that much money.

Q Isn't it a fact that she was earning $33 a week in Chicago?

A Absolutely not.

Q It is not a fact?

A No, it is not a fact.

Q What was she earning?

A. I couldn't say for sure but I don't think it was more than $12.

100 Q If you can't say for sure how do you know?

A I know—I can't exactly state the amount, whether it was $12 or $15, but it wasn't any more than that, that I know.

Q You know that. You know where she worked just before she went home to Creston?

A For Mr. Sheer.

Q She was paid at Mr. Sheer's, wasn't she, $28 a week, with a $5 commission, making $33 a week?

A No, I don't know anything about that.

Q Do you know whether that is a fact or not?

101 A She never told me that. She told me she was only earning—I can't say for sure whether it was $12 or $15.

Q Didn't she get $12 a week when she started to work for Sheer; she worked there six or seven years and that is what she got when she started?

A I think that is what she got.

Q You wouldn't expect her to work for six or seven years with the same salary?

Mr. Miner. That is objected to as calling for the opinion and conclusion of the witness.

102 The Court. Objection is overruled.

A At that time $12 was a big salary and I wouldn't say that he paid her more. He possibly did but I don't remember at the present time.

Mr. Stearns.

Q Well, as a matter of fact, you never knew how much he paid her, of your own knowledge?

A I wouldn't just swear to it, still I am pretty sure that he didn't pay her more than $12 or $15, because at that time that was a pretty good salary.

in those times. 103

Q. In 1917?

A. That was 1911 and 1912.

Q. How about 1917? What was she earning in 1917?

A. I couldn't say that.

Q. What was she earning in 1916?

A. I couldn't say that either but I know when she worked for Mr. Sheer it was only $12 or $15.

Q. She worked for Mr. Sheer, she testified, from 1910 until 1917.

A. At different times. 104

Q. Only when she went back to make those visits, that was her testimony.

A. No, she didn't work steady.

Q. Do you know what she was earning in 1913?

A. I wouldn't say in regard to her salary. I know she wasn't getting any more than $12 or $15. I am pretty sure of that.

Q. And the brother said that if she would come back and take care of the mother and the house he would pay her?

A. He sure did. He said he would pay her 105 more than she could earn in Chicago.

REDIRECT EXAMINATION

By Mr. Miner:

Q. And that if the mother passed away he would still pay her, something to that effect?

Mr. Stearns: Wait a minute—

Mr. Miner: Q. You said that, didn't you?

A. Yes, after the mother passed away she could still depend on him for her living and that he

106 would look after her future, that is what he told her.

Mr. Stearns: Q. If she would continue to render services for him at the home?

A. That is what was understood, I suppose.

Mr. Miner: Will you admit that under the mortality tables Mr. Anderson had an expectancy at the time of his death of 33.92 years, and that Miss Anderson, at the age of 30, had an expectancy of 35.33 years?

Mr. Stearns: Subject to the competency of such
107 testimony.

Mr. Miner: Now, as to the earnings, you had some table with reference to that?

Mr. Stearns: I have got November and December, 1918, and the full years of 1919 up to the time of the death, showing the total earnings, average earnings per year, average earnings per month, showing the back pay, when it was paid, and all that, and it was taken from the original record.

(Plaintiff's Exhibit A is marked.)

Mr. Miner: Plaintiff offers Plaintiff's Exhibit
108 A in evidence. May it be admitted that the Wells-Dickey Trust Company is the duly appointed administrator?

Mr. Stearns: Yes, sir.

Mr. Miner: The plaintiff is duly appointed by the probate court of Hennepin county special administrator of this estate, for the purpose of this law suit?

Mr. Stearns: Yes.

Mr. Miner: I think that is all. Plaintiff rests.

ADA C. ANDERSON, 109

being recalled for cross-examination under the statute, testified as follows, examined by Mr. Stearns:

Q. Miss Anderson, your brother was living at Creston, Iowa, at the time of his death?

A. Yes, sir.

Q. What county of Iowa is that in?

A. Union county.

Q. Shortly after his death and prior to the commencement of this action you petitioned the probate court of Union county, Iowa, to become 110
administratrix of your brother's estate, did you not?

Mr. Miner:

Objected to as immaterial.

The Court: Why is it material?

Mr. Stearns: It is material, your Honor, because the statute provides that when a general administratrix has been appointed a special administrator cannot act any further, and I am going to raise that point.

The Court: Has that been threshed out? 111

Mr. Stearns: Not in that case.

Mr. McDonald: It was mentioned by the Supreme Court.

Mr. Stearns: This is all denied in this case and the point was not raised before, not passed upon by the court.

Mr. Miner: I raise the further objection they cannot collaterally inquire into the appointment of an administrator.

112 Mr. Stearns—Defendant now offers to prove that Ada C. Anderson, on the 17th day of January, 1921, in the probate court of Union county, Iowa, a court of competent jurisdiction, petitioned said court for letters of administration of the estate of her brother, Elmer E. Anderson, that on the 14th day of March, 1922, the probate court of Union county, Iowa, appointed said Ada C. Anderson, administratrix of the estate of her brother, Elmer E. Anderson, and thereupon Ada C. Anderson filed a bond, approved by the court and then and there
113 became the duly appointed, qualified and acting administrator of the estate of her brother, Elmer E. Anderson, that she was at all times a duly appointed, qualified and acting administratrix of the estate of Elmer E. Anderson from March, 1922, up to the time of the commencement of this suit, and is still the duly appointed, qualified and acting general administratrix.

Mr. Miner—Objected to as immaterial.

The Court—Objection is sustained.

Mr. Stearns—Exception.

114 Q. Now, Miss Anderson, after your mother died you went back to Chicago?

A. Yes, sir, about six or eight months after she died.

Q. And you have been working in Chicago since?

A. Yes.

Mr. Miner—That is objected to as immaterial.

The Court—Since the death of the mother?

Mr. Miner: Yes, since the death of the mother 115
and the brother also.

A. I had to have some—

Mr. Miner: Wait a minute.

The Court: Objection is overruled.

Mr. Miner: Exception.

A. Yes, sir.

Mr. Stearns: Q. And isn't it a fact that at the time you went back to your home in Creston in 1917 and for some time prior thereto, you were being paid $33 a week salary?

Mr. Miner: That is objected to as immaterial. 116

(No ruling.)

A. No, sir.

Mr. Stearns: Q. You were being paid $28 a week?

A. No, sir.

Q. You were not?

A. No, sir.

Q. Were you working for Sheer Brothers?

A. Yes, sir.

Q. What were you being paid?

Mr. Miner: That is objected to as immaterial. 117

The Court: Objection is overruled.

Mr. Miner: Exception.

A. I started with a salary of $12, $10 or $12, I don't remember, and sometimes he paid me extra for a little extra bookkeeping I did, but I never received a salary of $33, never.

Mr. Stearns: Q. What was the highest salary you did receive from Sheer Brothers?

A. I don't think I ever got over—if I got $22

it was the most I ever got from Mr. Sheer.

Q Miss Anderson, didn't you have a conversation with me in Mr. McDonald's office last week?

A You talked to me, yes, sir.

Q And didn't I say to you at that time that I wanted to go over this report as to your earnings and find out whether they were correct and whether it would be necessary for me to bring in witnesses to prove the earnings, and you read them over; and isn't it a fact that at the time you went back to Croston you were drawing a salary from Sheer Brothers of $28 a week and an additional $5 a week for taking care of the books?

A I don't remember that you asked me.

Q Will you say that I didn't ask you?

A I wouldn't say you asked me.

Mr. Stearns Mr. McDonald, you were right there, isn't that a fact?

Mr. McDonald We had some conversation and you read this off. I said to you, as far as this earning capacity was concerned I didn't think there would be any question about it because it would not be material, but you read it off just as it is there.

Mr. Stearns And you agreed with me, just as it is there that if it was material you would stipulate to save me the trouble of bringing witnesses?

Mr. McDonald Yes, sir. I don't know whether she understood it or not. You read this over in the presence of all of us, there is no doubt about that, and at that time I said: "I don't think it is material." You said, "It may not be, I don't know.

myself."

Mr. Miner: Not in my presence.

Mr. Stearns: I don't believe you were in this case, Mr. Tautges was attorney in this case.

Mr. McDonald: You read this off, that about her salary, there is no question about that. I know you mentioned the figures and I know you mentioned the extra $5 for taking care of the books, but I know there was some dispute as to that.

Mr. Stearns: Yes, sir—

Mr. McDonald: Your report states 1920 and it was three or four years after that, we straightened that out.

Mr. Stearns: We straightened that out.

The Witness: And you said there must be some mistake in this record.

Mr. Stearns: No, I told you—the point you raised was that you had gone back to Creston March, 1917, that is the point you raised. Let me ask you again, your salary at the time was $12 a week when you started to work?

A. I started at $12.

Q. Did you get any extra pay?

A. Later on, right before I quit him, he paid me $5 a week extra for some bookkeeping for some extra business he had.

Q. You still say you never got any higher actual salary than $22 a week?

A. Yes, sir.

Q. And that you never received that $28?

A. I never received $28.

124 Q But you did get an additional $5 for taking care of books?

A Occasionally $5 a week, but that was not regular.

Q In our conversation I read you this and I read you the $28?

A I didn't pay no attention to what you read me, only when it came—

Q Just look over the second paragraph and see if that is what I read off to you?

Mr McDonald She said she don't recollect
125 the amount she was paid.

A You read this over, I don't remember just what you read.

Mr Stearns I ask for a continuance of the case to enable me to get proof as to the earnings. The facts were stipulated before the trial and on that account I did not get the witnesses. It would be a simple thing to get a deposition in Chicago.

The Court It is admitted that it was stipulated?

Mr McDonald He came over by appointment
126 and I told him if there was anything about the salary of Miss Anderson that we would be glad to agree to it if it was correct, because that point, we claim, is not material in the case. He came over and read part of this and it was all satisfactory—as far as I know it was—as it was read, except this date.

The Court Well—

Mr McDonald I told her at that time it wouldn't make any difference whether she was

earning a million dollars a year or five dollars a 127
year, that wouldn't be the point.

The Court: What I want to know is whether you stipulated with counsel the facts stated in that letter or memorandum.

Mr. Stearns: It was stipulated by the three of us.

Mr. McDonald: I stipulated, Miss Anderson did not. I said if there was anything that you wanted to show in this trial that would be material it would not be required of you to go to Chicago to take a deposition. 128

The Court: That was equivalent to admitting that—

Mr. Miner: As far as the stipulation was concerned, it was not made in my presence. If it was stipulated that the figures that are presented should go in as evidence they should go in, but I ask that they be admitted subject to the objection which I have made as to their being wholly immaterial.

The Court: I understand the situation is that there was a stipulation that those figures as to the 129
earnings are correct, and you are willing—

Mr. McDonald: Whether or not the witness understood, of course I do not know.

The Court: You are willing they should go in subject to your objection as to materiality?

Mr. Miner: If that stipulation was made it should be lived up to.

The Court: Was it made?

Mr. McDonald: That is just the conversation.

130 The Court: I think it amounts practically to a stipulation.

Mr. McDonald: With this reservation, it was read off as it is there by Mr. Stearns. I said: "Go right ahead, you need not take a deposition," whether she understood it or not, I don't know.

The Court: Well, you were her counsel. I think it appears satisfactorily there was a stipulation that those earnings were the earnings she was paid in Chicago and it would not be necessary to take any deposition to prove it.

131 Mr. McDonald: I don't know what she understood about it.

The Court: That is not very material, what she understood about it; what you gave counsel to understand.

Mr. Stearns: Then may it be stipulated that the earnings of Miss Anderson with Sheer Brothers, when she went to work for them in 1910 or 1911, when she started, were $12 a week, and at the time of her leaving in March, 1917, were $28 a week, with an additional $5 a week for taking care of
132 books?

Mr. Miner: Well, I don't know about that, if those figures are produced for what they are worth, now you are asking in addition to that that we are to stipulate that this girl's wages were so much, that I dissent from.

The Court: You dissent on the grounds that it is wholly immaterial.

Mr. Miner: Yes, on the grounds that it is wholly immaterial.

The Court: Why not have it understood that 133
those are the facts as to her earnings, subject to the claim of the plaintiff that they are immaterial?

Mr. Miner: If your Honor please, I do not want to disavow any stipulation that Mr. McDonald made, but I say that this lady ought to know what the figures are and nobody had a right to stipulate what was not true.

(Discussion between court and counsel).

Mr. Miner: I am perfectly willing to stipulate that if you called this gentleman from Chicago he would testify that those were the wages that were 134
paid.

The Court: Isn't that a fair proposition? Counsel stipulates that if your witness were called he would testify that those were the wages that were paid.

Mr. Miner: But I object to the evidence as wholly immaterial.

The Court: Yes, the stipulation is in the record as now made up.

Mr. Miner: I object to the evidence or figures as wholly immaterial, as not having any tendency 135
to prove the expectancy of this girl to receive contributions in the event he was killed.

Mr. Stearns: It is my understanding that it is stipulated that if Mr. Sheer, the employer of Miss Anderson, were called as a witness he would testify that Miss Anderson's wages from 1910 while working for Sheer in Chicago, were $12 a week, that at the time she left in 1917 and for some time prior thereto her wages were $28 per week and $5

136 per week additional for caring for the books.

Mr. McDonald. That is objected to as being wholly immaterial to the issues in this case.

The Court. Objection is overruled.

Mr. McDonald. Exception.

Mr. Stearns. Defendant rests and moves the Court to direct a verdict for the defendant on the ground that plaintiff under the complaint and the admitted facts has failed to establish a cause of action. It appears conclusively from the record that deceased left a mother, a member of the second
137 class of beneficiaries under the Federal act; that the parties were engaged in interstate commerce and are governed by the Federal act; that he left no wife or children; that the mother survived him and the cause of action vested in her, and that when she died in May, 1921, the cause of action died with her. On the further ground that plaintiff has failed to show any dependency within the purview of the Federal act, being a member of the third class of beneficiaries.

The Court. Motion is denied.

138 Mr. Stearns. Exception.

Counsel thereupon addressed the jury, after which the Court charged the jury as follows:

COURT'S CHARGE.

Ladies and Gentlemen of the Jury:

It is the duty of the court to charge the jury upon all questions of law to preside at the trial and rule upon objections, and it is the duty of the jury to accept the law just as given to you by the court. If counsel have inadvertently or other-

wise, in their discussions of the law in this case— 139
and it has been very freely discussed—made any
statement as to the law which disagrees with the
statement which the court will give you, or if any
member of the jury has any conception of what the
law is or should be different than the court gives
it you are to disregard such statement made by
counsel, if made, or such conception as you may
have as to the law, insofar as it disagrees with the
law as given you by the court, and accept the law
given by the court without any qualification.

On the other hand, the jury are the sole and ex 140
clusive judges of the questions of fact involved in
this case, and you are to rely solely upon your own
recollection as to what the facts are. If counsel
or court make any statements as to what the facts
are in this case which are not in accord with your
recollection, you are to disregard the statements
made by counsel also by the court, insofar as they
disagree with your recollection, and to rely entirely upon your own recollection.

You are the sole judges, also, of the credibility
of the witnesses. It is for you to determine (there 141
have been only two witnesses in this case) to what
extent you will believe these witnesses and what
they have said. In determining the credibility of
these witnesses you will take into consideration
how their testimony had been given, whether it has
been given in a frank, open and candid manner or
the reverse. You may take into consideration also
the interest which these witnesses may have in the
outcome of the trial of the case and how far, if at

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144

note in that class, to the parents of the employee, 145
and if there are no surviving parents then to the
next of kin dependent upon the employee.

In this case there is no dispute but that the de-
ceased was killed while working for the defendant
company on November 1, 1926, at Stanton, Iowa,
and there is no question as to the negligence of
the defendant, and no question has been raised of
contributory negligence; leaving the only question
for the jury to determine, what amount, if any,
the plaintiff is entitled to recover on behalf of the
sister of the deceased, Ada C. Anderson. In other 146
words, was the sister entitled to recover damages
as the next of kin of the deceased dependent upon
the deceased.

It appears from the evidence offered that the de-
ceased was employed as a fireman for the defendant
company at the time of his death, and for many
years prior to that time, to-wit, since 1900, Myers
lived at West Chicago in 1916, where his sister,
Ada Anderson, and presumably [illegible] were
then residing, and refused [illegible] to return home to
Creston, Iowa, where the family lived with a 147
their sister, the record being silent [illegible]
mother's health was poor and it was necessary
there should be some one to look after her.
That thereafter Ada Anderson [illegible] with
home [illegible] the latter part of the year 1916 or
part of 1917 and being [illegible] the money
[illegible] the mother [illegible] May, 1921. That
[illegible] the record [illegible] that [illegible]
[illegible] [illegible] [illegible]

able expectation of pecuniary benefit by the wrong- 151
ful death of the brother, the damages being limited
strictly to the financial loss sustained. The true
test is, as to the amount of recovery, if any re-
covery is had, what, in view of all the facts and cir-
cumstances in evidence, was the probable pecu-
niary interest of the sister in the continuance of
the life of the deceased.

A fair estimate may be arrived at by taking
into account the question of the occupation of the
deceased, in this case a fireman, and the average
annual income from 152
there is no dispute as to what he was receiving.
And his health, age, probable duration of life, his
habits, talents of industry, his success in life in
the past, and the amount of aid in money or serv-
ices which he had been accustomed to furnish
to beneficiary, in this case, his sister. The prob-
able duration of life is a proper element to be con-
sidered, but the life expectancy according to mor-
tality tables is not conclusive. The jury may make
its own estimate from the facts, health, habits and
physical condition of the deceased at the time of 153
his death.

It is impossible, I think, for the court to make
it any more definite than that. I know it is not
at all satisfactory to you gentlemen, but we get as help
But we submit to you that you are to take into con-
sideration all these matters that I have referred to
in giving of the damages. That is all that the
law will allow you to consider, and the amount
that you will allow the plaintiff is entirely
within the discretion of the jury.

154 cover.

The burden of proof is upon the plaintiff to be satisfied by a fair preponderance of the evidence, first, that the sister, Ada Anderson, has been deprived by the decease of her brother, and second, if she has been damaged, in what amount, under the rules of law I have given you. By fair preponderance of evidence I mean simply the greater weight of the evidence and testimony. It is with the side which presents the greatest degree of conviction to the mind of the juror where there is a dispute.

155 I want to call the jury's attention to what is called the two-thirds jury law, and that is, if the jury are unable to agree unanimously after being out for twelve consecutive hours, but a verdict may be arrived at by not less than nine members of the jury, in which case the verdict will be signed by all those who concur and dated upon that day. However, the verdict is unanimous or it need only be signed by nine persons. Which you will select yourselves upon retiring.

Two forms of verdict have been prepared by the 156 clerk, which you will take with you. One is in the following language:

"We, the jury in the above entitled action, find for the plaintiff and assess the damages in the sum of ..... dollars."

If you find that the plaintiff is entitled to recover, then you will use this form. But if you find that the plaintiff is not entitled to recover, then you will use the following form:

"We, the jury in the above entitled action, find

for the defendant."

If you find that the plaintiff is not entitled to recover then you will use this form and have it dated and signed by your foreman."

(Stay of forty days is agreed upon)

157

COPY OF PLAINTIFF'S EXHIBIT A

Statement showing earnings of Joe Ireman, E. E. Anderson

Year 1918-1919

November, 1918	$123.47
December, 1918	85.63
January, 1919	119.62
February, 1919	111.28
March, 1919	118.42
April, 1919	119.50
May, 1919	120.48
June, 1919	124.80
July, 1919	128.86
Back Pay	55.80
August, 1919	130.90
September, 1919	131.39
October, 1919	165.36
Total	$1549.21

158

159

Year 1919-1920

November, 1919	$ 76.32
December, 1919	150.56
January, 1920	96.91
February, 1920	134.52
March, 1920	140.08

180	April, 1920	127 66
	May, 1920	133 39
	June, 1920	77 25
	July, 1920	154 73
	August, 1920	175 21
	September, 1920	292 65
	October, 1920	227 75
	Back Pay	1 44 engineer
	Back Pay	19 06 fireman
	Back Pay	4 58
181	Total	$1,906 52
	Total earnings for two years	$43,437
	Average earnings per year	17,374 80
	Average earnings per month	1,447 90

Back pay allowed as follows:

$6 50 Supplement #1 General Order #27 January to April, 1920, inclusive.

$4 58 Interpretation #1 to Supplement #15 and General Order #27, January to August, 1920, inclusive.

$1 44 engineer and

182 $19 06 fireman under Decision #... Docket 1, and in covering May, June and July, 1920.

(Title of Cause) 163

NOTICE

To the Plaintiff above named, and Fantus & Wild or Robert J. McDonald, and F. M. Miner, its attorneys:

Please Take Notice, That the within transcript of testimony in the above case, consisting of forty-one (41) typewritten sheets, is hereby served upon you as a case in the within entitled action, containing all the evidence offered or received, and proceedings had at the trial, including the Court's 164
charge to the jury.

If dissatisfied, you are invited to prepare and submit such amendments as you deem advisable.

Dated January 3, 1925.

PIERCE, MCDERMOTT, STEARNS & WELLS,
Attorneys for Defendant,
201 Commerce Building,
St. Paul, Minnesota.

165

166 [Title of Cause]

STIPULATION SETTLING CASE

It Is Hereby Stipulated by and between the parties to the above entitled action, that the foregoing within transcript of testimony, consisting of Forty-one (41) typewritten sheets, contains all the evidence offered or received in evidence by the respective parties to said action at the trial thereof, including the plaintiff's Exhibit "A," together with all objections thereto, the rulings of the court

167 thereon and all objections taken to said rulings, also the charge of the court to the jury, together with all objections thereto by the respective parties, and also all court proceedings had at the trial of said action, and that the same may be settled and allowed by the court, as and for the settled case herein.

Dated February 14, 1925.

Jacobus & Wilcox,

Rugg & McDermott & F. M. Myers,

Attorneys for Plaintiff.

168 Dunning, McDermott, Stevens & Weeks,

Attorneys for Defendant.

(Title of Cause).

169

ORDER SETTLING CASE.

I, P. W. Guilford, do hereby certify that the foregoing proposed case, consisting of forty one (41) typewritten sheets, contains all the evidence and all objections made at the trial, the decisions and rulings of the court thereon, and all objections taken thereto, also the charge of the court to the jury, together with all objections taken thereto by the respective parties; also all proceedings had at the trial of the case.

170

I find that said case is conformable, and I hereby allow and settle the case as and for the settled case herein.

Dated February 14, 1925.

P. M. GUILFORD,

Judge.

171

172 (Title of Cause)

NOTICE OF MOTION FOR JUDGMENT

To the Plaintiff above named and Lancaster B... ..., Robert J. McDonald, and F. M. Moore, ... attorneys.

You Will Please Take Notice, That the above-named defendant, Chicago, Burlington & Quincy Railroad Company, will apply and move the Honorable Page W. Guilford, Judge of the above-entitled Court, at special term of said court in the
173 City of Minneapolis, County of Hennepin, State of Minnesota, on the 23rd day of January, 1926, at ten o'clock A. M., on said day or as soon thereafter as counsel can be heard

1. For an order allowing and settling as a settled case herein the transcript of testimony at the trial proposed herein, as and for a case on the 7th day of January, 1926.

2. For an order vacating and setting aside the verdict heretofore rendered herein in the sum of Four Thousand Seven Hundred ($4,700.00) Dollars, in favor of the plaintiff, and its order directing the entry of judgment notwithstanding said
174 verdict in favor of the above named defendant and against the above named plaintiff.

The motion first herein named will be based upon all the pleadings, all the files, records and proceedings herein, including the case before proposed and upon the statutes in such case made and provided.

The motion last herein named, will be made and 175
based upon the pleadings, all the files, records and proceedings herein, upon the case as settled and allowed by the Court, together with this notice, and upon the statutes in such case made and provided, and upon the following further grounds:

First: Because said verdict is not supported or justified by the evidence.

Second: Because said verdict is contrary to law.

Third: Because said verdict is contrary to the evidence. 176

Fourth: Because the court should have granted the motion of the defendant made at the close of all the evidence at said trial to direct a verdict in favor of the above named defendant and against the above named plaintiff.

Dated January 29, 1925.

Dean, McDermott, Stearns & Wells,
Attorneys for Defendant,
901 Commerce Building,
St. Paul, Minnesota. 177

178 (Title of Cause)

ORDER

The above entitled matter came on for hearing before the undersigned, one of the judges of the above named court, at the court house in the City of Minneapolis, Minnesota, on February 14, 1952, upon a motion by the defendant for an order vacating and setting aside the verdict rendered herein in favor of the plaintiff and directing the entry of judgment notwithstanding the verdict in favor
179 of the defendant and against the plaintiff. The grounds of said motion are set up in the notice of motion. Messrs. McDermott, Stearns & Weiss appeared as attorneys for the defendant and Robert J. McDonald and F. M. Miller appeared as attorneys for the plaintiff. The matter having been presented and duly considered by the court,

It Is Ordered that said motion be and the same is hereby denied.

Dated April 29, 1952.

180 By the Court

F. W. GILFILLAN

Judge.

MEMORANDUM 181

I

This is a motion by the defendant for judgment notwithstanding the verdict. The case was first tried before the Hon. W. W. Bardwell, one of the judges of the above named court, who dismissed the action on the ground that decedent's mother, who survived him, was his only beneficiary and upon her death there was no cause of action for the benefit of a remoter beneficiary. Upon appeal 182
to the Supreme Court the judgment entered in this court was reversed, and the case came on for trial again before the undersigned on November 25, 1924. The case was submitted to the jury and a verdict returned in favor of the plaintiff. Defendant now makes a motion for judgment notwithstanding the verdict upon the ground that the beneficiary for whom the action was prosecuted was not a dependent within the meaning of the Federal Employers' Liability Act of 1908.

183

II

"Judgment should not be ordered under the statute unless it clearly appears from the whole evidence that the cause of action or defense sought to be established does not, in point of substance, constitute a legal cause of action or a legal defense. It is not alone sufficient to authorize such a judgment if the evidence was such that the trial court, in its discretion, ought to have granted a

184 new trial. If there is some evidence reasonably tending to prove a good cause of action or defense, judgment should not be ordered." Dunnell's Digest, Section 3082.

III

The Federal Employers' Liability Act of 1908, so far as material, is as follows:

"Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee."

185

IV

186 The [illegible] in the first and second classes of cases [illegible] well settled. The matter is fully discussed in Roberts Federal Liability of Carriers, Volume 2, Sections 621 and 624. The rule firmly established is that there must appear, as to classes 1 and 2, some reasonable expectation of pecuniary assistance or support, of which the beneficiaries have been deprived. Michigan Central Railway vs. Vreeland, 227 U. S. 59. Dooley vs. Seaboard Air Line Railway, 161 N. C., 154.

V. 187

As to Section 3, however, it is necessary to show that the beneficiary was dependent upon the deceased, and that is the question at issue in this case. What is meant by "dependency"? Unfortunately there has not been very much construction by the courts of the meaning of the word "dependent" in the employers' liability act, and no case has been brought to the court's attention where the facts are parallel to those in the case at bar. The word "dependency" has been construed many times in connection with insurance policies. 188

The definition of "dependent" in Webster's Dictionary is as follows: "One who depends; one who is sustained by another or who relies on another for support or favor."

"The term dependents is limited to those who reasonably rely upon others for substantial nourishment or support." Bacon Benefit Societies, Volume 1, Section 261

"Dependent does not mean dependent for favor or companionship or for affection nor does it refer to occasional gifts. It means dependence for support and maintenance, need not be complete dependence for support but a regular and partial dependence." Martin vs. Woodman, 111 Ill. App. 99 189

The matter is fully discussed in the railroad cases cited in Roberts Federal Liabilities of Carriers, Sections 624 to 627. Also see note to Bertles vs. Northern Pacific R. R. Co., Ann. Cases 1912B, page 733.

190 The following are some of the cases illustrating the variety of legal definitions of the word "dependent":

"There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support or with some reasonable claim to support from deceased." Duval vs. Hunt, 34 Fla., 85.

In Smith vs. Pryor, as Receiver, 105 Mo. App. 250, the brother who was killed had made occasional contributions to his sister living in Moyer, with whom he did not live. It was held she was not dependent. The court says in that case:

191 "But mere occasional gifts do not make the recipient dependent upon the giver within the meaning of the statute. True, the act does not require that the dependency must be complete or entire. A partial dependency will be sufficient to furnish the basis of an award in some amount. But dependency, either in whole or in part, must exist. It is a state or relation. Dependence is 'the state

192 of relying upon something or some one, as for anything necessary or desirable.' New Standard Dictionary. It has in it also something of the idea of continuity of relation, so to speak. The term 'dependent' in the statute is somewhat similar in meaning to the term used in the charter of associations which provides for the payment of benefits to persons dependent upon deceased members. 'A dependent, as the term is used in reference to those

benevolent associations, is one who is sustained by 193
another, or relies for support upon the aid of another." Alexander vs. Parker, 144 Ill. 355. "A person is dependent upon another when he has the moral right to rely and does rely upon such other for support either in whole or in part. Murphy vs. Novak, 223 Ill. 591. The mere fact that deceased had at different times sent her an occasional sum does not establish dependency. While it is necessary to show only pecuniary loss in the case of a husband, wife, children or parents, yet in the case of one who is not in the above category, depend- 194
ency must also be shown and be proved like any other fact."

It will be noted that the above case is not a case where the parties lived together and not a case where the sister was substantially dependent for her support upon the brother.

In Collins vs. Pennsylvania R. R. Co., 148 N. Y. Supp. 1005, it is held that only the next of kin actually dependent can recover. In this case a brother lived with his sister and it appeared that his earnings contributed to the household of $5 per 195
week but he suffered for his own support and that before there was no dependency.

In the case of Railway Company vs. Atwood, 102 Va., 440, deceased boarded with another sister, who was married and in good circumstances, and for whom the deceased made monthly contributions. Held that she was not dependent upon deceased inasmuch as the sister had a husband who supported her and the contributions

196 made by the brother did not amount to either sub-
stantial or entire support.

In the case of Booth vs. N. P. R. R. Co., 60 Wash., 632, a son made occasional contributions to the father and mother. The father supported himself as a salesman selling tea. It was held that he was not dependent, that occasional contribu-tions are not sufficient, that there must be a sub-stantial need on one side and a substantial finan-cial contribution at that need on the other side to make it dependency within the statute.

197 In the case of Hartley vs. St. Ry. Co., 198 Mass., 163, a brother made remittances to his sister who was in feeble health. Held, that there was a case of partial dependency made out which was sub-mitted.

In the case of Danielson vs. Railway Company, 80 Vt., 276, it was held that the mother could recover where the child contributed in a substantial degree to her support, although she was herself depend-ent on her husband and her own labor.

In the case of Haggerty vs. Penn. R. R. Co., 87
198 N. J. L., 388, the court defines the words "actual dependents" in the workmen's compensation act as referring to members of the deceased who were being wholly or in a substantial degree supported by the deceased at the time of his death.

Other cases of value are Railway Company vs. Roberts, 126 Ky., 801, Hepburn vs. Railway Company, 164 Mass., 559, Herbert vs. Boston & Albany Ry. Co., 156 Mass., 80, Robertson vs. Union Pac. Ry. Co., 140 N. W., 772 (Nebraska), and

Supreme Lodge, 37 L. R. A. New Series, 1191, (Nebraska); Welch vs. Railroad Company, 176 Mass., 393. 199

"Dependent" is defined in Wilber vs. New England Order, 192 Mass., 477, an insurance case, as follows: "Assistance not trivial or casual or wholly charitable, but substantial and material; a real obligation to furnish it, though not enforceable by law, resting on moral and equitable grounds and furnished, not gratuitously, but in recognition of such obligation."

200

VI.

In the case at bar it appears that the beneficiary was a sister of the deceased, 28 years of age, and that she had gone from the family home at Creston, Iowa, to Chicago, where she was employed for a number of years and entirely supporting herself. The deceased brother was a woman employed by the defendant company, receiving an average wage at the time of his decease of $143 per month, and living at the family home at Creston, Iowa, with his mother and sister. Both mother and sister were in poor health and needed care and attention. Deceased then went to Chicago and induced his sister to give up her employment and come home and take care of the household for him and the mother and sister. She did so, living there until the time of the decease of the brother, who was killed in an accident. 201

She was paid fifteen or twenty dollars a week after her return. Her brother also gave some of

202 [illegible] earnings to his mother. She went home and took care of the mother, the son paying for the upkeep of the home, buying the mother's clothing and gave the sister money for her own clothing. The sister of the deceased took care of the mother and the home, did the cooking and ran the house and what she received was for services rendered. She handled the finances of the home, paying the grocery bills, and he gave her money in addition to the fifteen or twenty dollars per week. It appears that she was not hired by the day or week
203 but did receive any regular amount that he gave her for her services whatever it could afford and whatever was needed, that she went to Iowa to care for her sister and mother, the brother asking her to see she would not be in want and could depend upon him for her support and that he agreed to provide for her if she came back and stayed at home.

There is also the evidence of another witness that the brother told her to come here and take
204 care of the home and he would pay her a great deal more than she could earn in Chicago, in the event of the mother passing on it she would still keep the home she could depend on him for the future. That some six or eight months after the death of the mother she went back but brought nothing but keep working there ever since. That the brother at all times was affectionate manner of that letter here marked

VII. 205

Considering the facts with reference to the above decision, I am of the opinion that the question is not free from doubt but that the court is not warranted under the rule of law in this state as to ordering judgment notwithstanding the verdict in making such an order and that there is sufficient evidence to warrant submission of the case to a jury. I am not inclined to follow the extreme position taken in the case of Duvall vs. Hunt, supra, where there must be an actual inability by the dependent to support herself; that such dependence as there is need not be complete or entire but there should be a substantial and more or less regular dependence of the beneficiary upon the deceased. 206

While occasional contributions under class 2 are not sufficient for definition of actual dependents given in the case of Hannah vs. Penn R. R. Co., supra, while applying to the workmen's compensation act of the State of New Jersey, seems to me to define the term "dependents" as in my judgment it 207 should be defined for the purposes of this case. In my opinion the relation of the beneficiary to the deceased in this case is somewhat analogous to that of a married woman who previous to the marriage was a wage earner entirely supporting herself and who enters the marriage relation giving to her husband services in reference to house-hold duties and other matters in return for which

208 to support her and care for her but not given her any definite or particular sum of money or wage.

In other words, I think there is sufficient evidence in this case to warrant a finding by the jury that the beneficiary, partly moved by parental love, undoubtedly was induced by the brother to give up her position of financial independence as a wage earner and to come and become a dependent in his home. That she was not a dependent in the sense that she undertook the services because of
209 necessity but a voluntary dependent, who became the manager of the household for her brother, mother and sister in return for indefinite and uncertain amounts given to her by the brother sufficient for the upkeep of the home and for her own personal needs, and that, therefore, at the time of the brother's death she was entirely dependent upon him for her support and maintenance, at least, I am of the opinion that the jury might so find upon the evidence.

F. W. GUILFOYLE,

210 Judge.

(Title of Cause). 211

JUDGMENT

The above entitled action having been regularly placed upon the calendar of the above named Court for the September A. D. 1924, General Term thereof, came on for trial before the Court and a jury duly impaneled and sworn to try the same on the 25th day of November A. D. 1924; which said jury did, on the 26th day of November A. D. 1924, duly render a verdict thereon. 212

Now, pursuant to said verdict and on motion of Messrs. Tautges & Wilder, Miner and McDonald, Attorneys for plaintiff, it is hereby adjudged that the plaintiff recover of the defendant the sum of Four Thousand Eight Hundred Forty seven and 20/100 Dollars the amount of said verdict and interest to date hereof, together with the sum of One Hundred Sixty one and 72/100 Dollars, costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of Five Thousand Eight and 98/100 Dollars. 213

$5,008.98

By the Court,

WALTER A. RYBERG,
Clerk of District Court.
By W. A. CARLSON,
Deputy.

214 (Title of Cause)

NOTICE OF APPEAL

To the Plaintiff Above Named, and Messrs. Miner & Wilder and Miner & McDonald, Its Attorneys:

Please Take Notice that the defendant in the above entitled action, Chicago, Burlington & Quincy Railroad Company, appeals to the Supreme Court from the judgment and the whole thereof entered and docketed in the above entitled
215 action on the second day of June, 1925, wherein it was decreed and adjudged that plaintiff have judgment against the defendant for the sum of Four Thousand Eight Hundred Forty Seven and 26 100ths ($4,847.26) Dollars, principal and interest, with costs and disbursements, in the sum of One Hundred Sixty One and 72 100ths ($161.72) Dollars, in all amounting to Five Thousand Eight and 98 100ths ($5,008.98) Dollars.

Dated at St. Paul, Minnesota, June 6, 1925.

DENEGRE, McDERMOTT, STEARNS & WEEKS,
216 Attorneys for Defendant,
[illegible] Commerce Building,
St. Paul, Minnesota.

Bond on appeal is hereby waived.

MINER & McDONALD,
Attorneys for Plaintiff.

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1

ASSIGNMENTS OF ERROR

First: The Court erred in denying the motion of appellant to direct the jury to return a verdict for appellant.

Second: The Court erred in denying the motion of appellant for judgment notwithstanding the verdict.

Third: The Court erred in holding that the verdict was justified and supported by the evidence.

Fourth: The Court erred in holding that the verdict was not contrary to law.

Fifth: The Court erred in holding that the verdict was 2
not contrary to the evidence.

No. 493 Hennepin County Laws, C. 7

Endorsed
Filed January 29th, 1926.
GRACE F. KAECHER,
Clerk

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,
Respondent, 8

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellant.

SYLLABUS

1. In a death action under the Federal Employers' Liability Act, the jury was justified in finding that a sister of the employee was dependent on him, although she was of age, free from physical or mental disability, and capable of earning her own livelihood, it being made to appear that, at her brother's request, she had given up an independent 9 occupation to manage his household and care for their mother, and that she regularly received from him money for her support and for the maintenance of the family.

2. Dependency is to be determined from the facts and circumstances of each particular case. It may exist although there was no actual necessitous want on the part of the alleged dependent, if he or she received support from one who furnished it voluntarily and who might reasonably be expected to continue to do so.

Affirmed.

10

OPINION

This case has been here before and is reported in 159 Minn. 417, 199 N. W. 101, to which reference is made for an outline of the facts.

It was there held that the plaintiff, after the death of the mother of the deceased employee, might maintain this action for the benefit of the employee's sister.

But two questions were litigated at the second trial: (1) Was the sister dependent on her brother at the time of his death? (2) If she was, what pecuniary loss did she sustain? Defendant rested without introducing any evi-
11 dence and moved unsuccessfully for a directed verdict. Both questions were submitted to the jury and a verdict returned for $4,700. This appeal is from the judgment.

The errors assigned are the refusal to direct a verdict and the denial of the motion for judgment notwithstanding the verdict. Both motions were based on the alleged failure of proof of the sister's dependency within the meaning of Sec. 8657, U. S. Comp. Stat. 1918, which reads in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering in-
12 jury while he is employed by such carrier in such commerce, or in case of the death of such employe to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe."

The evidence showed that the Anderson family lived at Creston, Iowa, and that Ada C. was a member of the family until she became nineteen years of age, when she went to Chicago, where she obtained employment and supported herself for a period of about six years. In the meantime

her father died, her mother, with a younger daughter and 13
the son Elmer E. remaining in the old home. The mother's health became impaired and Elmer decided to induce Ada to return and take charge of the household and care for the mother. He went to Chicago in 1916 or 1917 and had a conversation with Ada, heard by a disinterested witness, who testified that he asked Ada to come home and "take care of the house and he would pay her a great deal more money than she could earn in Chicago, and in the event of the mother passing out, if she would still keep his home, she could depend on him for the future. * * * After the mother passed away she could still depend on him for her living and that he would look after her future." Following this 14
conversation Ada gave up her position in Chicago, went home and managed the household and cared for her mother for about four years. Soon after her return her sister died and, on November 1, 1920, when Elmer lost his life, he and Ada and their mother constituted the family. From the time of Ada's return until November 1st, Elmer provided for the maintenance of the home and for her support. After his death and the death of her mother, Ada returned to Chicago, where she was earning a livelihood at the time of the trial.

Appellant contends that, because Ada was able to sup- 15
port herself when she left home for the first time, is supporting herself again, and has no physical or mental disability, she was not dependent on her brother at the time of his death.

Webster's Dictionary defines a dependent as "one who depends; one who is sustained by another, or who relies on another for support or favor." Ada was sustained by her brother and relied on him for support, and was dependent under this definition. But, of course, general definitions of a word contained in a statute do not control the inter-

16 pretation of the statute, for it is always the duty of a court to ascertain, if possible, the sense in which the word was used by the lawmakers and to give it the meaning intended.

The statute under consideration designates three classes of beneficiaries: (1) The surviving spouse and children of the employee; (2) the employee's parents; (3) next of kin dependent upon the employee. One in the first or second class has a right of recovery if he or she is shown to have sustained some pecuniary loss because of the death of the employee. Gulf &c. Ry. Co. vs. McGinnis, 228 U. S. 173. "The pecuniary loss is not dependent upon any liability of the employee to the beneficiary. That is not the sole test. 17 There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived." Mich. Cent. Rd. Co. vs. Vreeland, 227 U. S. 59. See also Moffett vs. B. & O. Rd. Co., 220 Fed. 39.

Where the action is brought for the benefit of a member of the third class, dependency must be shown. There are cases holding that there is no dependency unless there was actual necessitous want on the part of the beneficiary and a recognition of that necessity on the part of the decedent. Duval vs. Hunt, 24 Fla. 85, is the leading case, and the opinion contains this language:

18 "A person who bases his right of recovery on the fact that he is dependent upon the deceased for support * * * must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or nonage, physical or mental incapacity, coupled with the lack or property means, dependent in fact upon the deceased for support. There must be, when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support, or with some reasonable claim to support from the deceased."

So. Ry. Co. vs. Vessell, 192 Ala. 140, Ann. Cas. 1917D 892, 19
and Bortle vs. N. P. Ry. Co., 60 Wash. 552, Ann. Cas. 1912B
731, quote this statement with approval, and appellant asks
us to apply the doctrine of these cases to the facts in the
case at bar. We must decline to do so for these reasons:

Whether a person is dependent on another is essentially
a question of fact to be determined from the circumstances
of the particular case. If the evidence furnishes a reason-
able basis for the conclusion of partial or total dependency,
a jury may find for the plaintiff and award damages com-
mensurate with the pecuniary loss suffered. One of the cir-
cumstances to be considered is whether the person for whose
benefit the action is brought had a reasonable expectation 20
of support from the deceased. Was she being supported by
him in whole or in part? Did he provide for her support
regularly or irregularly? For how long a time had he sup-
ported her? These are some of the questions to be consid-
ered in determining whether or not the beneficiary was de-
pendent on the deceased, had a well founded expectation of
support, and suffered a pecuniary loss by reason of his
death. In re Carroll, 116 N. E. 844.

We think it cannot be said that an adult, free from dis-
ability and capable of earning a livelihood, can never be
dependent on another. It is a matter of common knowledge
that women are sometimes supported by near relatives, able 21
and willing to provide a home for them. A woman in that
situation is freed from the necessity of becoming a wage-
earner. By following some gainful occupation for which
she is fitted, she may be able to earn enough to pay for food,
shelter and clothing, but that fact does not demonstrate that
she is not a dependent. A sister may be under no contract to
live with a brother and manage his household affairs for
him, and he under none to continue to provide her with a
home, but, as long as he does, she is dependent on him and,

22 when his death cuts off that source of support, she suffers a pecuniary loss, and compensation under the statute is the substitute for that which she has lost.

Our attention has not been called to any case directly in point. In construing Workmen's Compensation Acts, the courts have often had occasion to consider the meaning of the word "dependent." See notes in Ann. Cas. 1918B 749 et seq.; 13 A. L. R. 686; 30 A. L. R. 1253 and 35 A. L. R. 1066. See also Herrick's Case, 217 Mass. 111, Kenney's Case, 222 Mass. 401, and Blanton vs. Wheeler & Co., 91 Conn. 226. These cases point to the conclusion we reach in

23 holding that a finding of dependency was permissible under the circumstances of the present case, and in adopting, as the true test of dependency, actual support rather than inability on the part of the alleged dependent to earn a livelihood.

Judgment affirmed.

24

No. 193 Hennepin County Per Curiam. 25

Endorsed

Filed February 19, 1926.

GRACE F. KAERCHER,
Clerk.

WELLS-DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, 26

Appellant.

PER CURIAM

One ground of the defendant's motion for a directed verdict was that the sister of the deceased was not a beneficiary under the statute, his mother living at his death but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict. The question was considered on the former appeal and is again pressed by the defendant. We hold that the 27
sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are advised but one case, Kerner vs. Mississippi &c. 158 La. 863, involving a similar statute, has arisen since. The conclusion there reached is not in harmony with that adopted by us. The contention of the defendant has been considered again on this appeal, we adhere to the decision made on the former one, and the judgment is affirmed.

28 STATE OF MINNESOTA, SUPREME COURT

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS.—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the Court below, herein appealed from, to

29 wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things Affirmed.

And it is further determined and adjudged that Respondent herein, do have and recover of Appellant herein the sum and amount of Forty and 20/100 Dollars ($40.20) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Feb. 10, A. D. 1926.

BY THE COURT

Attest:

GRACE F. KAERCHER,

30 Clerk.

STATEMENT FOR JUDGMENT

Statutory costs, $25.00.

Printer, $15.20.

Total, $40.20.

STATE OF MINNESOTA }
} ss.
SUPREME COURT }

I, Grace F. Kaercher, Clerk of said Supreme Court, do

hereby certify that the foregoing is a full and true copy of 31
the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, February 10, A. D. 1926.

GRACE F. KAERCHER,

Clerk.

Filed February 10, A. D. 1926.

GRACE F. KAERCHER,

Clerk. 32

(SEAL)

34 IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

PRAECIPE

WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant,

23948 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

35 WELLS DICKEY TRUST COMPANY, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant

TO THE CLERK OF THE ABOVE ENTITLED COURT

You are hereby requested to make transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Cer-
36 tiorari in said cause, the transcript to consist of

The record on appeal in said cause;

ASSIGNMENTS OF ERROR

The opinion of the Supreme Court of the State of Minnesota;

All the records and proceedings of the Supreme Court of the State of Minnesota relating to said cause;

The final judgment and decision of the Supreme Court of the State of Minnesota;

Your certificate to the record that it is a complete rec- 37
ord in said cause.

Dated this 22nd day of April, 1926.

DENEGRE, McDERMOTT & STEARNS,
Attorneys for Chicago, Burlington
and Quincy Railroad Company.

38

39

40 IN THE SUPREME COURT OF THE
STATE OF MINNESOTA

WELLS-DICKEY TRUST COMPANY, a Corporation, as Special Administrator of the Estate of Elmer E. Anderson, Deceased,

Appellant

23948 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent

WELLS DICKEY TRUST COMPANY, a Corporation, as Special
41 Administrator of the Estate of Elmer E. Anderson, Deceased,

Respondent,

24936 —VS—

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellant

CLERK'S CERTIFICATE TO RECORD

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing, consisting of 117 numbered pages, is a true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court of
42 the Fourth Judicial District in and for Hennepin County to this Court, opinion of this court thereon, final judgment of this court on said appeal and praecipe for preparation of said record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court, this 23rd day of April, 1926.

GRACE F. KAERCHER,
Clerk of the Supreme Court
of the State of Minnesota.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.